Katelyn Deibler

4817 36th Street NW Apt. 309, Washington, D.C. 20008 · kdeibler@american.edu · 717.606.8970

EDUCATION

American University Washington College of Law, Washington, D.C. August 2020–May 2024
Juris Doctor Candidate, Evening Division GPA: 3.87 (Top 5%)
Journal: American University Law Review, *Note and Comment Editor*
CALIs*:* Legal Research and Writing I (Fall 2020), Sex Based Discrimination (Spring 2022), Administrative Law (Summer 2022), Health Care Fraud & Abuse (Fall 2022), Copyright (Fall 2022)
Awards: Dean's Merit Endowed Scholarship Recipient (2023) | Ira P. Robbins Award Recipient (2023)
Positions: *Teaching & Research Assistant*, Administrative Law & Torts, Andrew Popper (June 2022–Present)
Research Assistant, Employment Discrimination, Susan Carle (May 2023-Present)
Teaching Assistant, Contracts, Michael Carroll (August 2021-December 2021)
Publications: Katelyn Deibler, *The Blacklist: Post-Employment Retaliation Under the False Claims Act*, 49 OHIO N.U. L. REV. 21 (2022)
Pro Bono: National Immigrant Women's Advocacy Project (January 2021-January 2023)

American University, School of International Service, Washington, D.C. August 2016–May 2019
Bachelor of Arts in International Relations
Activities: Division I Student Athlete (Cross Country & Track and Field)

EXPERIENCE

The Employment Law Group P.C., Washington, D.C.
Litigation Law Clerk September 2021–Present

- Research issues involving discrimination, retaliation, and harassment under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Rehabilitation Act, and state anti-discrimination statutes.
- Draft pleadings, discovery requests and responses, motions for summary judgment, motions to compel, motions in limine, opposition motions, and appellate briefs in matters before federal, state, and administrative courts.
- Served as member of three-person trial team in an eight-day age and disability discrimination jury trial, including drafting testimony charts, preparing opening and closing statements, co-authoring all affirmative and opposing motions in limine, writing proposed witness questions, providing exhibits and impeaching materials to attorneys, and documenting witness testimony to successfully defend against six motions for judgment as a matter of law.
- Assist U.S. Department of Justice's Civil Frauds and Criminal Antitrust Divisions and U.S. Attorney General Offices in investigations of and intervention into sealed and unsealed False Claims Act, Anti-Kickback Statute, Financial Institutions Reform, Recovery, and Enforcement Act, and Criminal Antitrust Anti-Retaliation Act whistleblower complaints.
- Communicate with clients and opposing counsel to respond to their inquiries and provide case updates.
- Manage heavy case load of 15-20 matters at any time and meet all accompanying litigation deadlines.

George P. Mann & Associates, Silver Spring, Maryland
Federal Appeals & Litigation Intern May 2021–August 2021

- Conducted legal research on Violence Against Women Act, U-Visa Program, and Special Immigrant Juvenile Status.
- Analyzed judicial opinions and hearing transcripts to suggest issues for appeal.
- Drafted and revised appellate brief to be filed with the Court of Appeals for the Sixth Circuit.

American University, School of Public Affairs, Washington, D.C.
Faculty Affairs Coordinator December 2019–September 2021

- Managed promotion and re-hiring processes for all full-time and adjunct faculty at the School of Public Affairs.
- Coordinated with Senior and Associate Deans on adjunct faculty hiring and course assignments.

INTERESTS

- Long-Distance Running | Reading Classical Fiction | Cooking & Baking

LAST	FIRST	M	AU ID	BIRTH	SEX
DEIBLER	KATELYN	M	4295687	11/07	F

DATE PRINTED	PAGE
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Washington College of Law
ACADEMIC RECORD

AMERICAN UNIVERSITY
WASHINGTON, DC

Course Number	Course Title	Hnr	Crs Val	Grd	Quality Points
FALL 2020					
	DEGREE OBJECTIVE: JURIS DOCTOR				
LAW-504-005	CONTRACTS		04.00	A	16.00
LAW-516-032	LEGAL RHETORIC I		02.00	A	08.00
LAW-522-005	TORTS		04.00	B+	13.20
	LAW SEM SUM: 10.00HRS ATT 10.00HRS ERND 37.20QP 3.72GPA				
SPRING 2021					
LAW-501-005	CIVIL PROCEDURE		04.00	A-	14.80
LAW-507-005	CRIMINAL LAW		03.00	A	12.00
LAW-517-032	LEGAL RESEARCH & WRITING II				
	RESEARCH & WRITING II		02.00	A	08.00
	LAW SEM SUM: 9.00HRS ATT 9.00HRS ERND 34.80QP 3.86GPA				
SUMMER 2021					
LAW-633-001	EVIDENCE		04.00	A	16.00
	LAW SEM SUM: 4.00HRS ATT 4.00HRS ERND 16.00QP 4.00GPA				
FALL 2021					
LAW-503-005	CONSTITUTIONAL LAW		04.00	A-	14.80
LAW-508-005	CRIMINAL PROCEDURE I		03.00	A-	11.10
LAW-796F-002	LAW REVIEW I		02.00	P	00.00
	LAW SEM SUM: 9.00HRS ATT 9.00HRS ERND 25.90QP 3.70GPA				
SPRING 2022					
LAW-518-005	PROPERTY		04.00	A-	14.80
LAW-550-001	LEGAL ETHICS		02.00	A	08.00
LAW-691-001	SEX-BASED DISCRIMINATION		03.00	A	12.00
	LAW SEM SUM: 9.00HRS ATT 9.00HRS ERND 34.80QP 3.86GPA				
SUMMER 2022					
LAW-601-001	ADMINISTRATIVE LAW		03.00	A	12.00
LAW-799-085	LEGAL RESEARCH PROJECT		01.00	A	04.00
	LAW SEM SUM: 4.00HRS ATT 4.00HRS ERND 16.00QP 4.00GPA				
FALL 2022					
LAW-605-001	CONSTITUTIONAL LAW: 1ST AMEND		03.00	A	12.00
LAW-623-001	COPYRIGHT		03.00	A	12.00
LAW-719B-001	HLTH CARE FRAUD & ABUSE		03.00	A	12.00
LAW-798F-002	LAW REVIEW EDITORIAL BOARD		02.00	P	00.00
	LAW SEM SUM: 11.00HRS ATT 11.00HRS ERND 36.00QP 4.00GPA				
SPRING 2023					
LAW-643-001	FEDERAL COURTS		04.00	A	16.00
LAW-668-001	EMPLOYMENT DISCRIMINATION		03.00	A	12.00
LAW-798S-002	LAW REVIEW EDITORIAL BOARD		02.00	P	00.00
	LAW SEM SUM: 9.00HRS ATT 9.00HRS ERND 28.00QP 4.00GPA				

Course Number	Course Title	Hnr	Crs Val	Grd	Quality Points
	LAW CUM SUM: 65.00HRS ATT 65.00HRS ERND 228.70QP 3.87GPA				
	END OF TRANSCRIPT				

Hilary T. Lappin
Registrar

AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW

Office of the Law School Registrar
4300 Nebraska Ave., NW, Suite C107
Washington, DC 20016-2132

BACHELOR OF LAWS/JURIS DOCTOR

The Degree of Bachelor of Laws was re-designated the Juris Doctor degree by the Board of Trustees of The American University on October 15, 1968. The J.D. degree is conferred nunc pro tunc as of the date of the student's actual graduation from the Washington College of Law.

GRADES (Calculated in grade point average)

Effective Fall 1968 through Summer Session 1975 the Law School used the following 3.00 grading system:

A=3; B+=2.5; B=2; C+=1.5; C=1; D=0.5; F=0.

Effective Fall 1975 the Law School converted to a 4.00 grading system:

A=4; B+=3.5; B=3; C+=2.5; C=2; D=1; F=0.

Effective Fall 1997 the Law School used the following 4.00 grading system:

A=4; A-=3.7; B+=3.3; B=3; B-=2.7; C+=2.3; C=2; D=1; F=0.

Effective Fall 2019 the Law School used the following 4.00 grading system:

A=4; A-=3.7; B+=3.3; B=3; B-=2.7; C+=2.3; C=2; C-=1.7; D=1; F=0.

GRADES (Not calculated in grade point average)

IP	In Progress	P	Academic Pass in Pass/Fail Course
L	Audit	FZ	Academic Fail in Pass/Fail Course
--	Grade not yet recorded	W	Withdrew

ACCREDITATION

American University Washington College of Law is fully accredited by the American Bar Association (ABA) and by the Middle States Association of Colleges and Schools (MSA).

June 06, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write in strong and unequivocal support of Katelyn Deibler, an applicant for a clerkship in your chambers. I have known Katelyn since enrolling in law school two years ago. Katelyn was in my torts class and later in my administrative law class. She was, by far, the outstanding student in both.

Katelyn's administrative law exam was, by any measure, the best exam I have read in four decades of teaching. She was a wonderful participant in those classes – thorough, insightful, and incredibly well-prepared. Based on that and a number of interactions, I hired Katelyn as a teaching and research assistant at the end of her second year. I have had the great pleasure of working together since that time.
Lest this get lost in a sea of superlatives – I have never known a student more qualified to work as a law clerk and more likely to excel in our profession. She handles doctrinal complexities with stunning ease. Her approach is uniformly insightful and her presentations calm and perfectly understandable. She possesses the unique quality of clarity in all that she does. Her distillation of what I believe to be truly difficult material is unlike any student with whom I have worked. On task after task, she truly amazes me.

The end product on each and every task she has been assigned is impeccable. She does not miss anything. Beyond that, she is creative and unflappable, easily in the top couple of students I have ever taught or with whom I have worked. I see her as a colleague and value her input and insights as I would with my most trusted colleagues on the law school faculty.

I have read her remarkable legal scholarship and between that and her work with me, I already consider her an up and coming legal scholar. This is a brilliant, committed student who, importantly, is easy going and truly a joy to be around. She has an orderly and effective manner and add to that a great sense of humor and engaging personality and you get Katelyn Deibler.

Katelyn is a hard-working, self-sufficient and unencumbered law student. I recommend her most highly and without the slightest reservation. Please do not hesitate to contact me if you have any questions about her.

With appreciation,

Andrew F. Popper
Professor of Law

Andrew Popper - apopper@wcl.american.edu - (202) 274-4233

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write in support of Katelyn Deibler joining your chambers as a judicial law clerk. The Employment Law Group, P.C. (TELG) hired Katelyn as a litigation law clerk in September 2021. Katelyn is a strong writer, diligent in her approach, and joined me at the counsel table for an 8-day jury trial in March 2023.

Katelyn performs high-level, substantive legal research and works from the intake of a case through trial. She has drafted complaints, discovery requests, and oppositions to motions for summary judgment for my review. Her first drafts are high quality. She often will notice minute details that have escaped others' attention.

I personally worked closely with Katelyn while preparing for an eight-day jury trial in Maryland state court this past March. Throughout the trial preparation process, Katelyn assisted me in drafting our opening statement, testimony charts, motions in limine and oppositions, and preparing our final exhibits. During the trial, she sat with me and my co-counsel at the counsel table, observing jury selection, motions arguments, and all arguments and testimony. Throughout the trial, she was actively engaged in organizing our witness and impeachment exhibits, proposing questions for witnesses, and tracking all witness testimony to successfully defend six of seven motions for judgment as a matter of law.

Katelyn's strengths have been recognized by more than just me. She receives strong feedback from each of TELG's principal attorneys about the strength of her research, her writing skills, her time management, and her organization. My colleagues have reported that Katelyn is a fast and precise legal researcher who quickly picks up on legal theory. I am confident that she will perform similarly in your chambers.

Please do not hesitate to contact me with any further questions about her.

Sincerely,

R. Scott Oswald

R. Scott Oswald
Managing Principal
The Employment Law Group, P.C.

June 5, 2023

I am writing to give the highest possible recommendation for a judicial clerkship to Katelyn Deibler, one of the very finest students we have at American University Washington College of Law.

I have had the pleasure of teaching Katelyn both in Constitutional Law and in a First Amendment survey class. She is exceptionally smart, writes with great skill and clarity, and brings highly perceptive analysis to even the most complex cases. In my view her skills, intelligence and experience make her a top candidate for a judicial clerkship.

I confess that in my courses, Katelyn has been a comparatively quiet student. But she asks the most penetrating questions and prompts the most thoughtful discussions with me during office hours or other conversations outside of class time. I have come to understand that although she is not going to be the first person to raise her hand to volunteer in class, she is second to no one in her preparation, insights, and depth of understanding of doctrinal concepts and of the use of even complex rules.

Her wisdom was always apparent to me in both classes, and I could literally see her in First Amendment building on the knowledge she had gained in Constitutional Law. She performed very well in both classes and was truly a pleasure to teach.

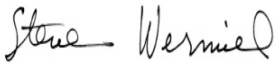
Her experiences beyond my classroom are extraordinary. She has served as a teaching assistant for two professors, covering three different courses. This is truly a recognition of what I have described above, the depth of her understanding of complex legal subjects. It is also a strong comment on her organizational and time-management skills. Throughout her time assisting these professors both in the classroom and with outside support, Katelyn was working fulltime and going to school largely at night. She was carrying a heavy workload supporting litigation attorneys in an employment litigation firm, was performing her roles assisting faculty, was working on our most respected journal, the American University Law Review, and all the while managed to maintain a stellar GPA of 3.85. This is truly remarkable.

On top of all that, she did the nearly impossible – she got her law review comment published in another journal outside WCL. That happens very rarely. Most journals publish their own student-pieces and have no room for work by students at other schools. But in recognition of her determination and success, Katelyn was published in the Ohio Northern University Law Review in 2022.

As you can tell by now, I have the absolute highest regard for her abilities, intelligence, work ethic, writing strength, and so much more. She is, in addition to all of this, a delightful person who would fit in perfectly in a collegial but demanding work environment.

Please don't hesitate to let me know if I may answer questions or offer more information. My cellphone is 240-472-2444, and my email is swermiel@wcl.american.edu.

Sincerely,



Stephen Wermiel
Professor of Practice of Constitutional Law and
Interim Director, Program on Law & Government
American University Washington College of Law

Writing Sample

The attached writing sample is an Opposition to the Defendant's Motion for Summary Judgment. I drafted this in my full-time position as a Litigation Law Clerk at the Employment Law Group, P.C. in September 2022. The opposition was filed in the Northern District of California. I produced the first draft the entire brief, and Principal Tom Harrington at The Employment Law Group, P.C. reviewed and made minor edits. In anticipation of using this as a writing sample, Mr. Harrington certified that this brief was substantially my own work.

The case involves claims of disability discrimination and failure to provide reasonable accommodations under the Rehabilitation Act of 1973 and the California Fair Employment and Housing Act. To reduce the document's length, I have omitted the introduction, statement of the facts, the first argument section discussing joint employment, and the conclusion.

If you have any questions about this writing sample, please feel free to contact Tom Harrington at tharrington@employmentlawgroup.com or General Counsel and Principal Nicholas Woodfield at nwoodfield@employmentlawgroup.com.

schedule. Ex. 7: Nassar Dep. 36:6-12. Wallace testified the reason a re-entry plan was not established for Libraty was because UCSF refused to proctor him. Ex. 4: Wallace Dep. 97:1-13. UCSF also repeatedly objected to Libraty's hiring, which ultimately led to his firing. *Id.*

These significant disputes of fact regarding the extent and impact that UCSF had regarding the VA's decision to revoke Libraty's job offer are more appropriately left to a jury.

2. UCSF failed to provide Libraty with reasonable accommodations.

Libraty has two claims under the Rehabilitation Act and FEHA for UCSF's failure to provide him with reasonable accommodations when it refused to create and sponsor his re-entry plan. Notably, UCSF purports to move for summary judgment on all claims, but it fails to argue why it is entitled to summary judgment on Libraty's two reasonable accommodations claims. Without UCSF bearing the burden of production, any finding of summary judgment is improper. *Anderson*, 477 U.S. at 250 n.4.

Under both the FEHA and the Rehabilitation Act, a prima facie case for failure to provide reasonable accommodations is met when (1) a plaintiff suffers from a disability; (2) the plaintiff is an otherwise "qualified individual"; (3) the employer is aware of the disability; and (4) the plaintiff was denied a reasonable accommodation. The burden lies on a plaintiff to show they are a "qualified individual[]," which only requires a showing that they "can perform the essential functions of their job," with or without reasonable accommodations. *See Buckingham v. United States*, 998 F.2d 735, 740 (9th Cir. 1993); 29 C.F.R. § 1613.702(f). When a reasonable accommodation is requested, a plaintiff must make a "facial showing that a reasonable accommodation is possible." *See Buckingham*, 998 F.2d at 740 (citing *Arneson v. Heckler*, 879 F.2d 393, 396 (8th Cir. 1989)); 29 C.F.R. § 1613.702(f)(2). After a plaintiff shows they are qualified for the position, the employer has an affirmative duty to provide all necessary reasonable accommodations. *Buckingham*, 998 F.2d at 740.

When interpreting the Rehabilitation Act, the Supreme Court of the United States determined that Congress intended the Act to prevent not just "invidious animus, but rather of thoughtlessness and indifference—of benign neglect." *Alexander v. Choate*, 469 U.S. 287, 297 (1985). Among the protections the Act sought to provide, it included the "discriminatory effect of job qualification . . . procedures." *Id.* (citing S. REP. NO. 93-318, p. 4 (1973)). Rehabilitation Act claims are subject to the same standard as claims arising under the Americans with Disabilities Act. *Scarborough v. Natsios*, 190 F. Supp. 2d 5, 19 n.10 (D.D.C. 2002).

There are no disputed facts regarding Libraty's first three prima facie elements. First, the undisputed material facts show Libraty was disabled. Ex. 4: Wallace Dep. 36:21-37:2. Second, both UCSF and the VA knew about Libraty's disability. Ex. 2: Samim Dep. 16:8-22; Ex. 3: Benninger Dep. 29:7-14; Ex. 5: Correa Dep. 18:23-19:12, 33:23-34:5; Ex. 17: Bukhari Dep. 32:9-14; Ex. 19 ¶ 13; Ex. 21; Ex. 24 ¶¶ 2, 9. Third, Libraty was a qualified individual. Following two interviews with the Fresno VA for the joint position, the interview panel *unanimously* voted to hire Libraty. Ex. 4: Wallace Dep. 41:11-15. Samim described Libraty as "very smart" and noted "it was a good interview, it was a very favorable interview." Ex. 2: Samim Dep. 13:25. Bukhari admitted Libraty had an "impressive CV," and Wallace believed Libraty was a very qualified physician who would provide excellent care for patients at the VA and UCSF. Ex. 17: Bukhari Dep. 32:5; Ex. 4: Wallace Dep. 56:22-25. Even Nassar determined that Libraty was an "excellent I[nfectious] D[isease] physician and researcher." Ex. 29. In sum, Libraty had over twenty years of clinical, teaching, and research experience, all of which made him qualified for the joint infectious disease position.

a. UCSF refused to proctor Libraty, denying him of a necessary reasonable accommodation.

Reasonable accommodations are "[m]odifications or adjustments to the work environment . . . that enable a qualified individual with a disability to perform the essential functions of that position." 29

C.F.R. § 1630.2(o)(1)(ii). For Libraty to begin his joint position with the Fresno VA and UCSF, he required two reasonable accommodations: minor mobility accommodations and a re-entry plan.

Libraty made his reasonable accommodation requests known to both UCSF and the Fresno VA. In his applications to both Defendants, Libraty was "very forthcoming about the fact that he had been out of clinical practice for a few years because of a prior stroke" and included "an unsolicited cover letter to explain his [medical] history." Ex. 4: Wallace Dep. 36:21-37:2. In his cover letter to the joint position, Libraty wrote that he required simple accommodations for his mobility. Ex. 16. His cover letter also discussed his significant gap in clinical medical practice because of his brain hemorrhage and subsequent recovery. *Id.* This gap in clinical practice required Libraty to complete a re-entry plan prior to receiving credentialing at the Fresno VA and a faculty appointment at UCSF. Ex. 30; Ex. 1: Libraty Dep. 42:20-22. Further, Libraty and Wallace verbally discussed his required re-entry plan was to accommodate his gap in clinical practice following his second interview for the joint position. Ex. 30; Ex. 1: Libraty Dep. 42:20-22. This reasonable accommodation request was subsequently communicated to UCSF. Ex. 32.

Libraty's re-entry plan was an adjustment made to Defendant's usual hiring process, and it accommodated the gap in Libraty's clinical practice which was a direct result of his stroke. It was an accommodation *necessary* for Libraty to begin the joint infectious disease position because of his gap in clinical practice following his stroke. Therefore, it squarely falls into the definition of what a reasonable accommodations is. Despite UCSF's knowledge of Libraty's reasonable accommodation request, UCSF refused to proctor Libraty, thereby denying him of the reasonable accommodation. Ex. 33. Nassar was acutely aware that Libraty's re-entry plan was intricately tied to his disability as evidenced by his email which asked if Nassar would violate the Americans with Disabilities Act if UCSF refused to proctor Libraty. *Id.* Yet with this awareness, Nassar and the rest of USCF refused to provide Libraty with the necessary accommodations he required to begin the joint position.

b. The re-entry plan was easy to implement and necessary to provide Libraty with equal employment opportunities.

After an employer is aware a reasonable accommodation is required, the employer has an affirmative duty to provide reasonable accommodations. *Buckingham*, 998 F.2d at 740. There are significant disputes of fact in the record regarding how much time and oversight it would have taken for Libraty to successfully complete a re-entry plan. Some testimony supports that the re-entry plan would be time consuming. Ex. 7: Nassar Dep. 32:1-7; Ex. 25. Meanwhile, most testimony supports that coordinating re-entry plans was a "standard process." Ex. 3: Benninger Dep. 36:25-37:2. For example, the Defendants routinely coordinated these programs for nurse practitioners and surgeons who were out of clinical practice for some amount of time, such as pregnancies. Ex. 4: Wallace Dep. 48:12-25; 69:1-6; Ex. 10. Libraty worked in infectious diseases, which is not a "procedure-based" field, meaning a re-entry plan required even less direct observation. Ex. 4: Wallace Dep. 67:25-68:15. It is estimated that Libraty's re-entry plan would only create an extra five or ten minutes of work for UCSF per day for four weeks. *Id.* at 68:16-68:24.

This conflicting testimony is material because if Libraty's re-entry plan was reasonable, it was unlawful for UCSF to refuse to proctor him. *See Buckingham*, 998 F.2d at 740. However, if the re-entry plan was costly or unduly burdensome, then UCSF's is not liable under either act. *Id.* Since there are competing facts regarding whether Libraty's accommodation request was reasonable, this is a question of fact properly left for a jury. *See Prilliman*, 53 Cal. App. 4th at 954. Further, courts frequently leave the question of whether an accommodation request was reasonable or not to juries. *See id.*

c. Libraty engaged in an interactive process with both Defendants to accommodate his disability; UCSF failed to reciprocate its efforts to accommodate Libraty's disability.

The FEHA and Rehabilitation Act require that when a reasonable accommodation is requested or known, an employer must "engage in a timely, good faith, interactive process with the employee or

applicant to determine effective reasonable accommodations." *Scotch v. Art Inst. of Cal.*, 173 Cal. App. 4th 986, 1003 (2009). In July and August 2019, the Defendants learned of Libraty's disability and reasonable accommodation requests. After scheduling his start date for October 15, 2019, Defendants had over two months to accommodate Libraty's disability following Libraty's completion of all other pre-employment requirements. Libraty completed all pre-employment qualifications. Ex. 5: Correa Dep. 63:23 – 64:4, 67:9-14. Libraty's lack of a re-entry plan was the sole reason Libraty could not be privileged and begin the joint position. Ex. 3: Benninger Dep. 55:14-16.

Neither UCSF nor the Fresno VA ever followed up on Libraty's reasonable accommodation requests. Ex. 1: Libraty Dep. 45:13-46:20. Four days before Libraty's start date, he asked the Fresno VA where he should report on his first day of work. Ex. 28. For the first time, he was told that neither Defendant had provided the requested reasonable accommodations so he could not start on October 15. *Id.* On October 18, Libraty requested an update regarding his start date and status of obtaining a re-entry plan for him. *Id.* For the next month, Libraty repeatedly reached out to ask for an update on his re-entry plan. *Id.* Finally, in mid-November, a full month after Libraty was supposed to begin his position, the Fresno VA invited Libraty for a visit without securing a re-entry plan. *Id.*

This pattern continued; Libraty asked for an update, and the Defendants told him they were still seeking to provide a re-entry plan. *Id.* For *seven* months, neither Defendant secured a re-entry plan or asked Libraty for more information that would aid them in organizing his re-entry plan. Ex 1: Libraty Dep. 114:16-115:4. Eventually, Libraty suggested a re-entry plan for himself which included having UCSF review some of his treatment plans for six weeks. Ex. 31. Yet, Defendants rejected the plan and did not explain why the re-entry plan was not viable or suggest a different plan. Libraty, alone, engaged in an interactive process for over seven months before his employment offer for the joint infectious disease

position was revoked. Ex. 20. By not even attempting to secure Libraty a re-entry plan, UCSF failed to engage in the required interactive process for Libraty's reasonable accommodation request.

3. By refusing to provide equal employment opportunities to Libraty, UCSF discriminated against him.

Both the Rehabilitation Act and FEHA have separate causes of action for failure to provide reasonable accommodations and disability discrimination. However, by failing to provide reasonable accommodations to disabled applicants and employees, employers can violate *both* causes of actions by treating the applicant differently than non-disabled applicants.

The *McDonnell Douglas* burden shifting framework is applied in FEHA and Rehabilitation Act cases. *Zamora v. Sec. Indust. Specialists, Inc.*, 71 Cal. App. 5th 1, 31 (2021). In this framework, the plaintiff has the initial burden of proving, by a preponderance of the evidence, a prima facie case of disability discrimination. *See Tex. Dep't of Comm. Affs. v. Burdine*, 450 U.S. 248, 253–54 (1981). Showing a prima facie case is *de minimis* and not onerous. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993). Once the plaintiff shows a prima facie case of disability discrimination, the defendant must "articulate some legitimate, nondiscriminatory reason for the employee's rejection." *McDonnell*, 411 U.S. at 802. If the defendant succeeds, the plaintiff must show by a preponderance of the evidence that the defendant's legitimate reasons were mere pretext for discrimination. *Id.* at 804. At the summary judgment stage, the plaintiff need not persuade the court that the defendant's rationale for the adverse action is pretextual; instead, he must only show there are disputes of material fact that would permit a reasonable person to disbelieve the defendant's proffered rationale. *Hutson v. McDonnell Douglas Corp*, 63 F.3d 772, 777 (8th Cir. 1995).

To establish a prima facie case of discrimination under the FEHA, a plaintiff must show he: (1) suffered from a disability; (2) was qualified for the position; and (3) was subjected to adverse

employment action because of his disability. *Choocagi v. Barracuda Networks, Inc.*, 60 Cal. App. 5th 444, 460 (Cal. Ct. App. 2021). Similarly, a prima facie case under the Rehabilitation Act requires:

> (1) at the time of the alleged discrimination, the plaintiff had a disability within the meaning of the Rehabilitation Act;
> (2) except for h[is] disability, []he was otherwise qualified for the position; and
> (3) []he suffered an adverse employment action because of his disability.

Walton v. U.S. Marshals Serv., 492 F.3d 998, 1005 (9th Cir.2007). At this stage, "a plaintiff is required to produce 'very little direct evidence of the employer's discriminatory intent to move past summary judgment.'" *Id.* at 832 (citing *Chuang v. Univ. of Cal. Davis, Bd. of Tr.*, 225 F.3d 1115, 1128 (9th Cir. 2000)). Instead, a plaintiff must only show a presumption of discrimination to prove that triable issues of fact exist. *Walton*, 26 F.3d at 890.

a. The first two elements of Libraty's *prima facie* case of disability discrimination are met.

The undisputed material facts show Libraty was disabled. Ex. 4: Wallace Dep. 36:21-37:2. Further, it is undisputed both UCSF and the Fresno VA knew about Libraty's disability. Ex. 21; Ex. 2: Samim Dep. 16:8-22; Ex. 3: Benninger Dep. 29:7-14; Ex. 5: Correa Dep. 18:23-19:12, 33:23-34:5; Ex. 17: Bukhari Dep. 32:9-14; Ex. 19, no. 13; Ex. 24, nos. 2, 9.

Next, Libraty was a qualified individual. Following two interviews with the Fresno VA, the interview panel *unanimously* decided to hire Libraty. Ex. 4: Wallace Dep. 41:11-15. Samim described Libraty as "very smart" and noted "it was a good interview, it was a very favorable interview." Ex. 2: Samim Dep. 13:25. Bukhari said Libraty had an "impressive CV," and Wallace believed Libraty was a qualified physician who could care for veterans at UCSF Fresno. Ex. 17: Bukhari Dep. 32:5; Ex. 4: Wallace Dep. 56:22-25. Even Nassar determined Libraty was an "excellent ID physician and researcher." Ex. 29. Libraty had over twenty years of both clinical, teaching, and research experience, all

of which was required in the Fresno VA position, making him well qualified for the joint infectious disease position.

b. There are significant disputes of material fact regarding whether UCSF's refusal to proctor Libraty was because of his disability.

It is well-settled that a plaintiff does not need to show their disability was the sole reason for the adverse employment action; it must only have been a motivating factor. *See Murray v. Mayo Clinic*, 934 F.3d 1001, 1107 (9th Cir. 2019); *Parker v. Columbia Pictures Indus.*, 204 F.3d 326 (2d Cir. 2000); *Gentry v. E.W. Partners Club Mgmt. Co. Inc.*, 816 F.3d 228, 235-36 (4th Cir. 2016); *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 315 (6th Cir. 2012) (en banc); *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 963-64 (7th Cir. 2010).

1. The reasons for UCSF's refusal to provide Libraty with reasonable accommodations are constantly changing, raising an inference of pretext.

Nassar cites various reasons regarding why Libraty was not hired for the joint position. On August 29, 2019, the VA asked UCSF if it could assist in proctoring Libraty. Ex. 25. That same day, Nassar asked his boss if declining to proctor Libraty would violate the Americans with Disabilities Act. Ex. 26. On August 30, 2019, Nassar told the VA he declined to proctor Libraty because Libraty was not board certified, thereby not meeting the minimum requirements for a UCSF faculty appointment. Ex. 25. Nassar claimed that because Libraty was not board certified, he was excluded him from teaching fellows or becoming a division member. *Id.* Therefore, Nassar declined to participate in the re-entry plan. *Id.*

Only a few days later, the system updated to show Libraty's board certification was active. Ex. 18. Nassar learned this on September 3, 2019. *Id.* However, Nassar then proffered a new reason for declining to proctor Libraty's: UCSF was "understaffed." Ex. 7: Nassar Dep. 42:15-18. This reason is also pretextual because Libraty's re-entry plan would only take approximately *five or ten minutes* a day, thereby not requiring a significant amount of oversight. Ex. 4: Wallace Dep. 52:4-53:12.

It is implausible that a hospital is so understaffed it would not have five or ten minutes to provide an employee with a reasonable accommodation. Further, an employer cannot refuse to provide reasonable accommodations if an employee's request for a reasonable accommodation is reasonable; any denial of an accommodations request that is "reasonable" is unlawful. *See Buckingham*, 998 F.2d at 740

Finally, UCSF recently discovered a third reason for why it could not provide reasonable accommodations for Libraty. UCSF now argues that its refusal to proctor Libraty was because Nassar wanted to protect UCSF and CCFMG's contract with the Fresno VA for infectious disease services. Dkt. 32-3 at 4. On September 5, 2019, UCSF and the Fresno VA met to discuss Libraty's hiring; at the meeting, Nassar expressed concern about how Libraty's hiring impacted the UCSF and CCFMG contract. Ex. 4: Wallace Dep. 58:7-25. However, the VA assured Nassar that Wallace hired Libraty to have more infectious disease staffing, creating positions for both Libraty and CCFMG. *Id.* at 59:11-20. Therefore, it is implausible that this could be considered a legitimate business reason to support not proctoring Libraty as the CCFMG contract was going to continue even with Libraty's employment. This, along with UCSF's changing explanations as to why it would not proctor Libraty creates a dispute of material fact as to whether Nassar declined to proctor Libraty due to discriminatory animus.

2. UCSF treated Libraty differently from other similarly-situated applicants for the joint infectious disease position.

Libraty was treated differently from other Fresno VA employees who were given faculty appointments. After UCSF receives an application for a faculty appointment, a committee is formed to review the applicant's CV and other documents. Ex. 9: Nassar 30(b)(6) Dep. 29:5-9. But despite Libraty submitting his application for a UCSF faculty appointment, he was never accepted or rejected from the position. Ex. 1: Libraty Dep. 115:16-116:1. UCSF never provided Libraty with notice that his application was incomplete or rejected. *Id*. at 115:16-116:1. Instead of gathering a committee to review

Libraty's application, as UCSF does for other applicants, Nassar and his assistant only discussed that Libraty's application was "disappointing," while refusing to pass it along for a vote. Ex. 23.

Further, this inference of discrimination is heightened because Nassar was eager to interview another non-disabled applicant for the joint position only one month before Libraty applied. Ex. 13. At no point during the conversations between the Fresno VA and UCSF about this non-disabled applicant did Nassar raise *any* concerns about UCSF's contract. *Id.* Instead, the Defendants jointly decided to offer the non-disabled candidate the position. *Id.* Yet, when an equally qualified Libraty later applied to the same position, Nassar refused to engage with the re-entry process, refused to provide reasonable accommodations, and constantly changed the reasons for UCSF's refusal to participate. Following the rescission of Libraty's offer, the Fresno VA hired a non-disabled physician into the joint position. Ex. 3: Benninger Dep. 65:8-66:6.

UCSF treated Libraty differently because of his disability by not providing him with the same opportunities it provided to other non-disabled applicants. Further, UCSF's disparate treatment between Libraty and other non-disable applicant raises further refutes UCSF's alleged legitimate business reasons. Because of this, and considering UCSF's constantly shifting explanations there are significant disputes of fact regarding whether UCSF's treatment of Libraty constituted disability discrimination.

IV. CONCLUSION

For the foregoing reasons, Libraty respectfully requests that UCSF's Motion for Summary Judgment be denied and this matter be set for a jury trial. UCSF functioned as a joint employer over the joint infectious disease physician position, making Libraty's claims against UCSF proper. Additionally, there are significant disputes of material fact regarding whether the adverse employment actions were taken against Libraty because of his disability, making summary judgment inappropriate. By refusing to provide Libraty with a re-entry plan to re-enter clinical practice following Libraty's brain hemorrhage

Applicant Details

First Name	**Catherine**
Middle Initial	**G**
Last Name	**Dema**
Citizenship Status	**U. S. Citizen**
Email Address	**cdema@pennlaw.upenn.edu**
Address	**Address** Street **201 S. 25th St. Apt. 224** City **Philadelphia** State/Territory **Pennsylvania** Zip **19103** Country **United States**
Contact Phone Number	**8163059935**

Applicant Education

BA/BS From	**William Jewell College**
Date of BA/BS	**May 2021**
JD/LLB From	**University of Pennsylvania Carey Law School** **https://www.law.upenn.edu/careers/**
Date of JD/LLB	**May 20, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Journal of Law and Social Change**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Lee, Robert
roblee@vcrrc.org
Rudovsky, David
drudovsk@law.upenn.edu
215-898-3087
Harris, Jasmine
jasmineeharris@law.upenn.edu
(917)405-8910

This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 12, 2023

The Honorable Jamar K. Walker
United States District Court
Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to request your consideration of my application for a clerkship beginning in the fall of 2024. I am a rising third-year law student at the University of Pennsylvania Carey Law School.

During law school, I have worked to develop legal analysis, research, and writing skills. As a summer law clerk at the Virginia Capital Representation Resource Center and as a legal extern at the Capital Habeas Unit at the Federal Community Defender Office in Philadelphia, I was challenged to think and communicate critically, creatively, and persuasively in advocating for clients. As an Executive Editor for the Journal of Law and Social Change, I have strengthened my editing, leadership, and organizational skills. Through coursework in appellate advocacy and seminar courses requiring submission of substantial legal research papers, I have expanded upon my attention to detail and writing skills, further developing a clear and concise style.

I am attaching my resume, transcript, and writing sample. Letters of recommendation from Professor David Rudovsky (drudovsk@law.upenn.edu); Professor Jasmine Harris (jasmineeharris@law.upenn.edu); and Rob Lee, Esq. (roblee@vcrrc.org) are also included. Please let me know if any other information would be useful. Thank you.

Respectfully,

Catherine G. Dema

Catherine G. Dema
201 S 25th St. Apt. 224
Philadelphia, PA 19103
cdema@pennlaw.upenn.edu
(816) 305-9935

EDUCATION

University of Pennsylvania Carey Law School, Philadelphia, PA
J.D. Candidate, May 2024

Honors:	Levy Scholar, full tuition merit-based scholarship
	Journal of Law & Social Change, Executive Editor
Activities:	Student Public Interest Network, President
	Penn Law Criminal Record Expungement Project

William Jewell College, Liberty, MO
B.A., *summa cum laude*, Physics and Oxbridge History of Ideas, May 2021

GPA:	3.908
Honors:	Oxbridge Honors Scholarship
	Honors Thesis in Physics: "*Double Diffusive and Rayleigh Taylor Instabilities in Particle-laden Water Stratified Over Salt Water in a Hele Shaw Cell"*
	Honors Thesis in Oxbridge History of Ideas: "*The Role of Autonomy and Oppression in Desire, Consent, and Relationships"*
Activities:	Gender Issues & Feminism Club, Founder and Engagement Chair
	The Hilltop Monitor, Features and Investigations Page Editor
Study Abroad:	University of Oxford, Hertford College, Oxford, UK, 2019 – 2020

EXPERIENCE

Regional Public Defender for Capital Cases, San Antonio, TX — May 2023 – Present
Summer Legal Intern
Write motions and briefs, draft pleadings, and conduct legal research for capital trials. Locate and interview witnesses, conduct in-person visits with clients and their families, and provide observations. Participate in team meetings and strategy sessions. Locate and obtain documents and records and gather statistical data.

Prison Legal Education Project, Philadelphia, PA — Oct. 2022 – Present
Post-Conviction Co-Chair
Consult with post-conviction organizations and attorneys, facilitate program to involve law students in pro bono legal research and writing for clients pursuing post-conviction relief. Write legal memos and conduct legal research to support incarcerated clients pursuing post-conviction relief. Attend visits to incarcerated people to provide legal education and answer questions about pursuing legal action while incarcerated. Draft curricula and materials to provide legal information for incarcerated people.

Federal Community Defenders Capital Habeas Unit, Philadelphia, PA — Jan. 2023 – May 2023
Legal Extern
Drafted briefs, persuasive claims, and memos for use in state and federal post-conviction petitions, including on ineffective assistance of counsel, timeliness of post-conviction petitions, and categorical cruel and unusual punishment. Conducted legal and factual research on state and federal post-conviction and capital habeas law. Attended court hearings and legal visits with incarcerated clients.

Custody and Support Assistance Clinic, Philadelphia, PA
Advocate Sept. 2022 – April 2023
rafted petitions, conducted intake interviews for pro se litigants in the Philadelphia Family Court system, and helped craft arguments through pro bono project in partnership with Philadelphia Legal Assistance.

Virginia Capital Representation Resource Center, Charlottesville, VA
Summer Law Clerk May 2022 – July 2022
Drafted persuasive inserts for claims within motions for post-conviction relief. Conducted legal and factual research on capital habeas law in a variety of states and circuits, and wrote memoranda presenting legal and factual research. Drafted claims in collaboration with law clerks and attorneys. Attended legal visits with incarcerated clients. Reviewed court documents and transcripts on PACER and attended court hearings.

Penn Law International Refugee Assistance Project, Philadelphia, PA
Court Monitoring Project Volunteer Sept. 2021 – May 2022
Researched immigration court closures. Interviewed attorneys representing clients at the closed courts and detention centers and wrote report presenting findings.

William Jewell College Physics Department, Liberty, MO
Undergraduate Researcher June 2017 – May 2021
Designed and conducted research projects; created optical imaging systems; trained and supervised research assistants. Wrote proposals and conducted presentations at college and national research conferences. Volunteered for STEM outreach to elementary students in Kansas City Public Schools.

Cornell Laboratory for Accelerator-Based Sciences and Education, Ithaca, NY
NSF REU Physics Researcher June 2019 – Aug. 2019
Used Python programming to model optical systems and light optics designs. Created and presented written and oral research reports. Volunteered for STEM outreach to elementary students in Ithaca, NY.

INTERESTS
Podcasts, exploring local coffee shops and restaurants, casual biking and indoor cycling.

Catherine G. Dema
UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

Spring 2023

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Crimmigration	Rodriguez	A-	3	
Education and Disability Law	Harris	A	3	
Externship: Federal Defender Capital Habeas Unit	Bluestine	CR	7	
JLASC Independent Research Seminar	Ossei-Owusu	CR	1	
Externship Tutorial	Bluestine	CR	0	
Journal of Law and Social Change Associate Editor	Kreimer	CR	0	

Fall 2022

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Constitutional Criminal Procedure	Rudovsky	A-	3	
Appellate Advocacy	Sweitzer	B+	3	
Evidence	Mayson	A-	4	
Community Lawyering to End Mass Incarceration	Grote/Holbrook	A	2	
JLASC Independent Research Seminar	Kreimer	CR	1	
Journal of Law and Social Change Associate Editor	Kreimer	CR	1	

Spring 2022

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Criminal Law	Ossei-Owusu	A-	4	
Constitutional Law	Kreimer	A-	4	
Plagues, Pandemics, and Public Health Law	Feldman	A-	3	
Administrative Law	Lee	A-	3	
Legal Practice Skills Cohort	Ramirez	CR	0	
Legal Practice Skills	Gowen	CR	2	

Fall 2021

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure	Wang	B+	4	
Contracts	Hoffman	A	4	
Torts	deLisle	A-	4	
Legal Practice Skills Cohort	Ramirez	CR	0	
Legal Practice Skills	Gowen	CR	4	

VIRGINIA CAPITAL REPRESENTATION RESOURCE CENTER

2421 IVY ROAD, SUITE 301
CHARLOTTESVILLE, VIRGINIA 22903

(434) 817-2970 TELEPHONE
(434) 817-2972 FACSIMILE

May 1, 2023

Letter of Recommendation in Support of Catherine G. Dema
for a Judicial Clerkship

Your Honor:

Please accept this letter in strong support of Catherine G. Dema's application for a judicial clerkship position. I met and became familiar with Catherine's work as the Executive Director of the Virginia Capital Representation Resource Center (VCRRC) when I supervised her as a law clerk during the summer of 2022. Catherine had just completed her first year of law school at the University of Pennsylvania.

VCRRC is a small not-for-profit law firm founded in 1992 to improve the quality of representation in capital cases through direct representation, consultation, and education services. In the decades that followed, VCRRC served both as counsel in direct representation of clients sentenced to death and as a centralized resource office providing consultation, training, and assistance to those representing people facing death sentences in Virginia.

At VCRRC, law clerks like Catherine serve on teams representing our clients. They worked directly with lawyers, investigators, and legal assistants on current issues in the litigation. Clerks help to identify, investigate, research, develop, and draft the factual and legal bases for the post-conviction claims in both state and federal courts. Their work directly impacts the litigation of client's cases.

Catherine was an excellent and welcome addition to our litigation teams. Two projects she completed during the summer were on behalf of people sentenced to death in federal courts in Texas and Virginia. The first was part of a reply to the government's motion to dismiss claims in a petition for relief under 28 U.S.C. § 2255 and involved an analysis of the sufficient of trial counsel's objections to witness testimony. It required intensive review and research of the statutes making up the Federal Death Penalty Act as well as the Federal Rules of Evidence. In the second project, also part of a Section 2255 case, Catherine developed arguments regarding the propriety of bifurcating an evidentiary hearing in a manner that would limit review to only a single requisite element of the claim. The government had argued that a narrow review would be more efficient. (The judge ultimately ruled in our favor.)

The nature of our work required Catherine to work independently and in collaboration with others. Finished drafts were required in adherence with deadlines. Quality product was expected. (I have come to appreciate that some members of our small staff are particularly demanding with regard to the detail and precision of written work product.) Catherine performed remarkably in each area. She asked good questions, sought clarity when appropriate, and delivered immediately useful products on time and in the form requested. She was a pleasure to work with as well, mindful of everyone's time while remaining personable and engaging, appropriate to the situation, and with a good sense of humor (a trait we value).

The stakes for our clients and staff are especially high, and scrutiny by our opponents and the courts can be exacting. Catherine respected these circumstances, and her work suggested she was not intimidated or hampered by them. I believe she is particularly well-suited to be part of a team in chambers, and will contribute significantly to what I imagine can be a fast-paced environment that also requires thoughtful analysis, research, and writing.

Based on my experience, I believe Catherine would make a significant contribution to assist the Court in meeting its various goals and responsibilities. I encourage the Court to get to know her yourself. I think you will find her to be an asset to your chambers.

Wishing you all the best.

My regards,

Rob Lee
Executive Director

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Clerkship Applicant Catherine Dema

Dear Judge Walker:

I write in support of the application of Catherine Dema for a clerkship in your Court. I am a Senior Fellow at the Law School where I teach courses in Criminal Law, Constitutional Criminal Procedure, and Evidence. In addition, for the past 50 years I have maintained a public interest/civil rights law practice in Philadelphia. In my teaching and law practice, I have had the opportunity to supervise many law students in internships, summer associate positions, and independent studies. As a result, I have developed a good understanding of student potential and the likely success of students in clerkships and other post-graduate positions.

Ms. Dema came to Penn Law as a Levy Scholar, a full tuition merit-based scholarship program. She graduated summa cum laude from William Jewell College with honors in both physics and history of idea and with a strong interest in criminal justice issues. At Penn Law, Ms. Dema has assembled an impressive academic record with grades almost entirely in the “A” and “A-” categories over her first three semesters. In addition, she currently serves as Executive Editor of the Penn Law Journal of Law and Social Change. She plans a career in criminal defense with a focus on capital cases and appellate advocacy and has engaged in internship and externship programs with the Federal Community Defender Capital Habeas Unit and the Virginia Capital Representation Resource Center (and his summer she will intern with the Texas Regional Defender Capital Case program) all in preparation for this field of work.

Ms. Dema was a student in my course in Constitutional Criminal Procedure and I had a good opportunity to evaluate her academic abilities. Her final examination and her classroom participation showed a strong understanding of the course materials, a full comprehension of doctrinal principles, the factors that shape investigative and trial practices, and the intersection of evidence, criminal law and constitutional restrictions on law enforcement practices.

In my discussions with Ms. Dema regarding her career goals and judicial clerkships, she has articulated a very strong interest in criminal justice issues and in particular capital defense litigation. I have no doubt but that she will practice very successfully in these areas. She sees a clerkship as an opportunity to improve her research and writing and analytical skills in areas other than criminal justice. She also expects that a clerkship will allow her to focus on courtroom advocacy and the qualities that ensure effective representation of clients.

Ms. Dema’s academic record and her work over the past several years demonstrate significant strengths in the qualities that make for an excellent law clerk. She is intelligent, mature, and focused and he will fit well into your chambers. I recommend her without reservation.

Sincerely,

David Rudovsky
Senior Fellow
Tel.: (215) 898-3087
E-mail: drudovsk@law.upenn.edu

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Clerkship Applicant Catherine Dema

Dear Judge Walker:

I write to enthusiastically recommend Catherine Dema, a student in my Education and Disability Law seminar, for a clerkship in your chambers. The seminar environment has enabled me to develop a close relationship with Catherine who has impressed me consistently throughout the semester with her intellectual curiosity, a deep engagement with the law, collegiality, and strong writing skills.

First, Catherine is intellectually curious and seeks to understand a case from multiple angles. She consistently raised questions, the answers to which, complicated standard narratives and perspectives on an issue. What are the stakes? What are the stakes of an erroneous outcome? Who bears the cost of error? In the context of special education law, for example, Catherine sought to understand the equities of the administrative process and the challenges parents face navigating a system designed as a foil to the adversarial process. Does this informality track the realities and experiences of the users? Catherine's insights deepened and shaped the direction of class discussions for the betterment of the group. Catherine connected dots across areas of law, for example, thinking through the Individuals with Disabilities Education Act as spending clause legislation, and what this means for its interpretation when situated in this broader framework. She can identify the specific questions of a case and zoom out to understand how the application of a statute to a particular set of facts operates in the broader context of the statute's (and similar statutes') interpretation.

Second, Catherine displays an eagerness and willingness to engage with others in collective thinking about legal interpretation and analysis. She takes time to listen to her peers and makes space for others in the conversation. This practice earned her the respect of her peers in the classroom.

Third, Catherine's writing is clear, organized, and nuanced. Catherine's research paper for the Education and Disability Law seminar examines the legal category of "emotional disturbance" under the Individuals with Disabilities Education Act and its interpretation by administrative judges and federal courts. The paper requires her to engage with Congressional intent, legislative history, administrative decisions, and those of federal courts. She has navigated these materials seamlessly. Of note, Catherine has also displayed the flexibility and resilience required of the best researchers. When her initial research challenged her early thesis, she made the necessary adjustments with a respect for the research process that is less common among law students. Her time management skills created space for her research process to unfold successfully.

Catherine Dema will make a fantastic law clerk. Her innate curiosity about the law coupled with strong writing skills and collegiality will enhance your chambers. Please do not hesitate to reach out with any questions about Catherine.

Sincerely,

Jasmine E. Harris
Professor of Law
jashar@law.upenn.edu

Catherine G. Dema
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(816) 305-9935

This writing sample is an excerpt from a persuasive brief I wrote for an Appellate Advocacy course at Penn Carey Law. The brief argues there was a violation of the Fourth Amendment right against unreasonable search and seizure when police conducted a vehicle stop based on an informant tip and frisked a passenger of the vehicle. The brief was originally 24 pages. The excerpt includes the argument portion of the brief. I have omitted the Statement of the Issues, Statement of the Case, and Summary of the Argument. This brief received general, nonspecific feedback through its development.

Argument

I. Police lacked a particularized and objective basis for suspecting a vehicle was involved in criminal activity, given the reliability and content of the tip directing police to the vehicle.

Standard of Review

In reviewing the denial of a motion to suppress, the Third Circuit exercises de novo review over the district court's legal conclusions and exercises clear error review over factual findings. *United States v. Price*, 558 F.3d 270, 276 (3d Cir. 2009). Whether police had sufficient reasonable suspicion to stop a vehicle, including the subordinate issues of reliability and content of the tip leading police to the vehicle, is a question of law. *United States v. Brown*, 159 F.3d 147, 148 (3d Cir. 1998). Review of this issue is therefore de novo. *Id.*

Discussion

Police officers may not conduct warrantless vehicle stops without probable cause unless officers have a reasonable suspicion the particular persons in the vehicle are involved in criminal activity. *Terry v. Ohio*, 392 U.S. 1, 30 (1968); *see also Navarette v. California*, 572 U.S. 393, 396 ("The Fourth Amendment permits brief investigative stops—such as the traffic stop in this case—when a law enforcement officer has 'a particularized and objective basis for suspecting the particular person stopped of criminal activity.'").

Police lacked a particularized and objective basis for stopping Mr. Washington's vehicle because they conducted the stop based on an unreliable and insufficient tip. Because the vehicle seizure was unlawful, this Court must suppress the evidence obtained in the course of the stop under the exclusionary rule and the fruit of the poisonous tree doctrine.

a. The informant tip was insufficiently reliable and lacked sufficient content to motivate reasonable particularized suspicion that Mr. Washington's vehicle was involved in criminal activity.

Police conducted the stop based solely on an insufficient informant tip from White about suspected credit card fraud. Informant tips prompting investigatory stops are evaluated for their reliability and content to determine whether officers had reasonable suspicion to conduct the stop. *United States v. Goodrich*, 450 F.3d 552, 560 (3d Cir. 2006); *United States v. Valentine*, 232 F.3d 350, 355 ("The reliability of a tip, of course, is not all that we must consider in evaluating reasonable suspicion; the content of the tip must also be taken into account, as well as other surrounding circumstances.").

Reasonable suspicion in an investigatory stop requires officers have a particularized and objective basis to suspect criminal activity was afoot. *Goodrich*, 450 F.3d at 552 ("The content of the tip, concomitantly, must provide a particularized and objective basis for suspecting (1) the particular persons stopped (2) of criminal activity."); *Florida v. J.L.*, 529 U.S. 266, 272 (2000) ("The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person."). "The ultimate question is whether a reasonable, trained officer standing in [Donnelly's] shoes could articulate specific reasons justifying [the vehicle's] detention." *Johnson v. Campbell*, 332 F.3d 199, 206 (3d Cir. 2003).

Courts evaluate the reasonableness of the stop in light of the collective police knowledge at the time of the stop. *See United States v. Whitfield*, 634 F.3d 741 (3d Cir. 2010) (applying the collective knowledge doctrine to a *Terry* stop involving a fast-paced and dynamic situation wherein "officers worked together as a unified and tight-knit team"). Accordingly, the entire tip provided by White to police dispatch, Harris, and—as well as Donnelly's observations before the stop—is relevant to evaluating the stop's unreasonableness.

Officers unreasonably stopped the vehicle because they relied on an informant of questionable credibility providing a tip requiring officers to assume a connection between Mr. Brown and Mr. Washington not present in the tip's content. The tip's content lacked a particularized and objective basis for suspecting Mr. Washington and his vehicle of credit card fraud. Such a suspicion relies on presumed connections between two separate customers, not a logically necessary or objective connection.

i. The informant was insufficiently reliable in providing the tip motivating police officers' stop of Mr. Washington's vehicle.

White was insufficiently reliable in providing the tip. He relayed second and third-hand information to police about Mr. Washington and Mr. Brown's actions. Officers hearing from White could not determine the credibility of those with personal knowledge of the Mr. Brown's transaction or Mr. Washington's transaction. Officers should have known White relayed the information through the lens of his mall experience, which is not the kind of expertise and experience officers may rely on in determining the reasonableness of a tip-motivated stop. This Court must consider informant reliability in assessing the reasonableness of a stop as part of the totality of the circumstances motivating the stop.

White was an unreliable informant because he conveyed information about which he lacked personal knowledge. White provided in-person information in addition to his phone call to police dispatch, but only White's reports of his own actions could be evaluated for their credibility. *See Valentine*, 232 F.3d at 354 (describing face-to-face tips as more reliable than anonymous tips because "the officer has an opportunity to assess the informant's credibility and demeanor" in a face-to-face tip). Police had no opportunity to assess the credibility of the sales associate who identified Mr. Washington as suspicious or the store manager who observed Mr. Brown's transaction. White himself did not witness suspicious behavior—he reported suspicions

of other mall employees. White's tip lacked the typical indicia of reliability present in an in-person tip. *See id.*; *see also J.L.*, 529 U.S. at 269 (describing indicia of reliability necessary for an anonymous tip to be reliable).

In light of the total circumstances, White's tip is not sufficiently reliable. Even if officers believed White's demeanor, voice and other factors supported his credibility, *Valentine*, 232 F.3d at 355, he explicitly relayed information from sources officers could not evaluate. White presented his understanding of the situation after evaluating the information shared with him and in light of his experience as a security employee. Police may draw on their own experience and expertise when determining the reasonableness of conducting an investigatory stop, but they may not similarly rely on the presumed experience and knowledge of an informant. *See United States v. Arvizu*, 534 U.S. 266, 273 (2002) (permitting "officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person'" when making reasonable suspicion determinations).

While Neiman Marcus employed White to protect merchandize, officers lacked information about White's skill and competency when they assumed the tip was reliable based on White's demeanor. In fact, White had a history of termination for overzealously stopping customers. While officers could not have known White's history, they should not have accepted his expertise as they would police expertise. White relayed second and third-hand information about potentially suspicious activity as a mall employee. He was an insufficiently reliable informant given the content of his tip to police.

ii. The informant tip lacked sufficient content to create reasonable suspicion Mr. Washington's vehicle and the particular persons stopped were engaged in criminal activity.

The content of White's tip was insufficient to motivate the stop of Mr. Washington's vehicle because it did not sufficiently connect Mr. Washington to any criminal activity. A tip's content is insufficient unless it simultaneously provides a "particularized and objective basis for suspecting (1) the particular persons stopped (2) of criminal activity." *Goodrich*, 450 F.3d at 560. White's tip failed to provide a particularized and objective basis for police's suspicion of Mr. Washington's vehicle of criminal activity.

Suspected of Criminal Activity

Officers unreasonably stopped Mr. Washington's vehicle because the tip failed to allege specific criminal activity of Mr. Washington and his vehicle. White's tip connected the vehicle only to Mr. Washington, whose allegedly suspicious activities included purchasing a Prada bag as someone from New York. The tip did not connect the vehicle to Mr. Brown's more suspicious conduct or any confirmed fraud. White's tip did not provide any detail indicating Mr. Washington was involved in criminal activity. *See United States v. Ubiles*, 224 F.3d 213 (3d Cir. 2000) (holding a stop unreasonable when a tip alleged the defendant had a gun in a crowded area where gun possession was not illegal failed to allege criminal activity).

While White suspected criminal activity was afoot, Mr. Washington engaged in purely lawful activities that did not indicate suspicion. An officer may not conduct a stop simply because some criminal activity is afoot. *United States v. Brown*, 159 F.3d 147, 149 (3d Cir. 1998). Officers must have particularized suspicion against the stopped individual. *Id.* Even though "a reasonable suspicion of criminal activity may be formed by observing exclusively

legal activity," *Ubiles*, 224 F.3d at 217, here, the tip failed to sufficiently allege Mr. Washington's vehicle was tied to criminal activity.

When individual innocent factors are used for a tip to suspect criminal activity, the combination of factors "must serve to eliminate a substantial portion of innocent [customers]." *United States v. Mathurin*, 561 F.3d 170 (3d Cir. 2009). White, and police officers, suspected Mr. Washington specifically only because he had New York identification and bought a Prada bag. Despite mall employee reports of past issues with New Yorkers, the factors involved do not serve to eliminate a substantial portion of innocent customers.

White himself could not articulate specific reasons the sales associate deemed Mr. Washington suspicious, but referenced security employees evaluating whether a customer looks like they "can't afford the item they are buying." (App. 105).[1] White's inability to articulate why he singled out Mr. Washington as suspicious shows the content of the tip lacked an objective and particularized basis for suspicion. Mr. Washington's conduct alone does not provide officers with reasonable suspicion he was involved in criminal activity.

Mr. Brown's conduct, too, does not provide reasonable suspicion Mr. Washington was involved in criminal activity. Mr. Brown's innocent actions were subject to greater suspicion because officers knew two of Mr. Brown's credit cards declined in his attempted transaction. Yet, a suspicious transaction occurring after several minutes after Mr. Washington's departure does not provide sufficient suspicion Mr. Washington was involved in criminal activity.

Courts evaluate reasonable suspicion based on a tip given the totality of the circumstances. *Brown*, 448 F.3d at 246–47 ("In evaluating whether there was an objective basis for reasonable suspicion, [the court] consider[s] 'the totality of the circumstances—the whole

[1] Racial biases may contribute to the belief Black men are less likely to afford expensive purchases, regardless of whether their other actions suggest fraud or suspicious activity.

picture.'"). Mr. Brown's actions fifteen minutes after Mr. Washington's purchase do not provide adequate suspicion Mr. Washington or his vehicle were involved in criminal activity. As one of the largest in the country, the mall made several calls alerting police of suspicious activity. Suspected suspicious activity at the mall on a Saturday afternoon fifteen minutes after Mr. Washington's purchase by another New Yorker would not serve to exclude a substantial portion of innocent customers. Mr. Brown's conduct does not provide sufficient reasonable suspicion against Mr. Washington.

Particular persons stopped

White's tip failed to particularize suspicion against the particular persons stopped—Mr. Washington and his vehicle—because such particularized suspicion requires an improper, unsupported inference Mr. Brown and Mr. Washington were connected. White told police that Mr. Washington purchased a Prada bag, presented New York identification, and left the mall to get in his vehicle. White told police that Neiman Marcus had issues with fraud with people from New York, but this information is vague, unconfirmed, and does not provide reasonable suspicion Mr. Washington himself engaged in criminal activity sufficient to justify a stop. Police officers lacked particularized suspicion against Mr. Washington and his vehicle; they conducted the stop because officers improperly assumed a connection between Mr. Washington and Mr. Brown and his failed purchases.

Police lacked an objective basis on which to assume a connection between Mr. Brown and Mr. Washington because the two men were never seen together, initiated transactions fifteen minutes apart, and left the store to different locations. White himself witnessed Mr. Washington leave the mall, enter the parking lot, get in his vehicle and leave. White explicitly told police he trailed Mr. Washington to his vehicle. After following Mr. Washington, White learned of Mr.

Brown's transaction and proceeded to follow him. White trailed Mr. Brown out of the Gallery to the Pavilion—a separate section of the mall. Mr. Brown entered the Pavilion, at which point White called police and notified them of trailing Mr. Brown to the crosswalk between mall sections. White did not observe Mr. Brown in the process of leaving the mall or getting in any car, let alone Mr. Washington's. The content of White's tip described these two separate paths and did not insinuate the men were seen together.

A sufficient tip's content must provide a particularized and objective basis for suspecting the particular individual of criminal activity. *Goodrich*, 450 F.3d at 560. White's tip failed to provide a particularized suspicion of Mr. Washington because the only connection between the two the tip alleged was that both men presented New York identification and initiated purchases of Prada bags fifteen minutes apart. The tip did not provide an objective connection between Mr. Brown and Mr. Washington or between Mr. Brown and Mr. Washington's vehicle. Accordingly, the tip's content insufficiently particularized suspicion to Mr. Washington's vehicle. The stop was unreasonable because White's tip did not allege Mr. Washington was involved in criminal activity nor did it particularize suspicion against Mr. Washington.

Donnelly's observations of the vehicle prior to the stop did not corroborate or strengthen any suspicion of criminal activity. Donnelly did not testify to any abnormal or suspicious behavior conducted by the vehicle. The tip's content, therefore, provided the entire basis for the stop despite failing to particularize suspicion against Mr. Washington or allege Mr. Washington was involved in criminal activity.

b. The credit cards obtained from Mr. Brown in the course of the illegal stop must be suppressed under the "fruit of the poisonous tree" doctrine.

Because Donnelly unreasonably stopped Mr. Washington's vehicle, the evidence obtained from Mr. Brown in the course of the stop must be suppressed. As a passenger in an illegally stopped vehicle, Mr. Brown has standing to object to the fruits of the unlawful seizure.

When police conduct an illegal stop of a vehicle, all passengers in the vehicle are also seized. *See Arizona v. Johnson*, 555 U.S. 323, 327 (2009) ("For the duration of a traffic stop . . . a police officer effectively seizes 'everyone in the vehicle,' the driver and all passengers"); *United States v. Mosely*, 454 F.3d 249, (3d Cir. 2006). A passenger is seized for the duration of the stop. *Johnson*, 555 U.S. at 333. Seized passengers have standing to object to the stop and seek to suppress "evidentiary fruits of [an] illegal seizure under the fruit of the poisonous tree doctrine." *Mosley*, 454 F.3d at 253. When there is a factual nexus between the illegal stop and the evidence obtained, the evidence is improperly obtained and is fruit of the poisonous tree that must be suppressed. *Id.* at 254.

When officers illegally stopped Mr. Washington's vehicle, Mr. Brown was seized, and police improperly obtained evidence from Mr. Brown. Because Mr. Brown is challenging the illegal vehicle seizure, not an illegal vehicle search, he has standing to challenge evidence obtained in the course of the seizure. *Id.* at 253. Here, the credit cards retrieved from Mr. Brown's sock are the fruit of the illegal stop. There is no question of the factual nexus between the stop and the evidence obtained. *Id.* at 256 ("Where the traffic stop itself is illegal, it is simply impossible for the police to obtain the challenged evidence without violating the passenger's Fourth Amendment rights."). The evidence found on Mr. Brown must be suppressed.

II. Police lacked a reasonable belief Mr. Brown was armed and dangerous given Mr. Brown moved in a seized vehicle with tinted windows suspected of involvement with credit card fraud.

Standard of Review

In reviewing the denial of a motion to suppress, the Third Circuit exercises de novo review over the district court's legal conclusions and exercises clear error review over factual findings. *Price*, 558 F.3d at 276. Whether police had a reasonable suspicion Mr. Brown was armed and dangerous is a question of law. *United States v. Edwards*, 53 F.3d 616, 618 (3d Cir. 1995) (conducting plenary review over whether the facts supported a reasonable inference the suspect was armed and dangerous). Review of the issue is therefore de novo. *Id.*

Discussion

Burnett's frisk of Mr. Brown violated the Fourth Amendment protections against unreasonable searches. Even if the court rules that the stop was reasonable, the frisk leading to recovery of evidence against Mr. Brown mandates suppression of the evidence.

A frisk is "a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment." *Terry* 392 U.S. at 17. A frisk is unreasonable unless officers had a reasonable belief the suspect is armed and dangerous. *Id*. Police officers may not conduct a reasonable search for weapons unless they have "reason to believe that [they are] dealing with an armed and dangerous individual." *Id.* at 27. An officer does not need to be certain a suspect is armed. *Id.* If a reasonable officer in their position would be warranted in the belief the suspect is armed and dangerous, then a frisk is reasonable. *Id.* Officers must have a particularized, articulable suspicion the suspect is armed and dangerous.

Burnett unreasonably frisked Mr. Brown because he lacked a reasonable belief Mr. Brown was armed and dangerous at the time of the frisk. Before Burnett frisked Mr. Brown, he

saw Mr. Brown's empty hands and Mr. Brown complied with all requests. Burnett lacked a sufficient particularized suspicion that Mr. Brown was armed and dangerous at that moment, so Burnett unreasonably searched Mr. Brown. The evidence recovered should be suppressed under the fruit of the poisonous tree doctrine.

a. Officer Burnett unreasonably frisked Mr. Brown because a reasonable officer in Burnett's position could not provide a reasonable, articulable suspicion that Mr. Brown was armed and dangerous at the time of the frisk.

Burnett lacked reasonable suspicion Mr. Brown was armed and dangerous when he frisked Mr. Brown because any potential risk relaxed before the frisk. Even if officers had reason to stop the car, they still needed particularized reasonable suspicion Mr. Brown in particular was armed and dangerous to justify the frisk. *Terry*, 392 U.S. at 21 ("[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."). The test is "whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Id.*

Suspected credit card fraud does not make it more likely Mr. Brown was armed and dangerous. Police officers suspected Mr. Washington's vehicle of credit card fraud and had no particularized information about any passenger. Credit card fraud at the mall is not a violent crime, nor is it a bold crime whose nature suggests armed perpetrators. *See Edwards*, 53 F.3d at 618 (holding that an attempted daylight bank robbery "could lead one to believe that the perpetrators might have armed themselves to facilitate their escape if confronted").

In *Edwards*, police were notified of credit card fraud occurring at a bank in broad daylight. *Id.* The court deemed officers' suspicion the passengers were armed and dangerous reasonable because committing fraud at a bank in broad daylight is a risky activity where

perpetrators could reasonably have weapons to use in the event they were confronted. *Id.* Unlike in *Edwards,* here police suspected the vehicle of involvement in low-level credit card fraud occurring at a busy mall on a Saturday afternoon. The suspected criminal activity did not suggest armed perpetrators, so the suspected crime did not make it more likely that Mr. Brown was armed and dangerous.

Burnett's stated reasons for frisking Mr. Brown included the vehicle's tinted windows and Mr. Brown's movements in the backseat of the car. *See Leveto v. Lapina*, 258 F.3d 156, 165 (evaluating the facts police officers alleged motivated the frisk in finding the search of the defendant unreasonable). Burnett acted on his suspicions by opening the passenger door and ordering the passenger out. Burnett observed Mr. Brown and saw he lacked a weapon, yet Burnett still proceeded with the frisk. Burnett's provided reasons fail to justify the frisk because they do not particularize a suspicion Mr. Brown was armed and dangerous after he already exited the vehicle.

Burnett lacked particularized suspicion Mr. Brown was armed and dangerous based on the tinted windows because concerns about the windows should have been relaxed after Mr. Brown exited the car. Tinted windows may contribute to concerns occupants are armed. Officers could have requested all vehicle occupants exit the car if they feared for their safety due to the tinted windows. Just because a vehicle is connected to criminal activity, all occupants are not automatically connected to the criminal activity. *See Ybarra v. Illinois*, 444 U.S. 85, 90 (1979) (holding that possession of a warrant to search a premises alone is not sufficient to justify a pat down of a person found on the premises). Officers connected Mr. Washington, not other passengers, to suspected credit card fraud. No officers, including Burnett, knew the passengers' identities nor whether passengers were connected to the suspected fraud.

Suspecting the vehicle of criminal activity does not justify frisking passengers unless an officer in the situation would reasonably believe that specific passenger was armed and dangerous. In *Ybarra v. Illinois*, police officers had a warrant to search a bar; the warrant specifically mentioned a bartender, but no customers. *Id.* at 87–88. Officers proceeded to frisk patrons while executing the warrant. *Id.* at 88. They frisked the defendant two distinct times before retrieving drugs from his possession on the second frisk. *Id.* at 88–89. Officers had no probable cause to suspect the patrons were involved in illegal activity. *Id.* at 90–91. The court ruled that officers lacked reasonable suspicion to frisk the defendant because no officers recognized him as a person with a criminal history or had any reason to think he may assault the officers. *Id.* at 93. The defendant's "hands were empty [and he] gave no indication of possessing a weapon, made no gestures or other actions indicative of an intent to commit an assault, and acted generally in a manner that was not threatening." *Id.* The state could not articulate specific facts that would have justified an officer in suspecting the defendant was armed and dangerous. *Id.*

Mr. Brown's presence in a vehicle suspected of criminal activity did not justify Burnett's frisk. At the time of the stop, Mr. Brown was not connected to the suspected fraud. Mr. Brown complied with all officer orders and had empty hands when he exited the car. Burnett's claims that tinted windows and Mr. Brown's movements in the car motivated his frisk do not articulate specific facts that would have justified an officer in suspecting Mr. Brown was armed and dangerous at the time of the frisk.

Mr. Brown's movements in the backseat do not justify the frisk because concerns about his movements should have been relaxed after Mr. Brown exited the car. When Burnett saw Mr. Brown "disappear" by leaning over, Burnett opened the car door. Burnett saw Mr. Brown's hand

near his foot, as though he stashed something under the seat or retrieved something. Burnett grabbed Mr. Brown and ordered he exit the car. Mr. Brown complied. At that moment, if Mr. Brown possessed a weapon, it would have been in one of two locations: under the seat or in Mr. Brown's hand.

When Mr. Brown exited the car, he could no longer reach any potential weapon under the seat. Burnett saw Mr. Brown's empty, weaponless hands. Once Mr. Brown exited the car, away from the seat, and complied with orders any fears Burnett had that Mr. Brown was armed and dangerous should have dissipated. *See United States v. Moorefield*, 111 F.3d 10, 11 (3d Cir. 1997) (holding that defendant's failure to follow instructions contributed to officers' reasonable suspicion the defendant was armed and dangerous).

The factors Burnett presents as motivating the stop fail to justify Burnett's frisk of Mr. Brown. In *United States v. Brown*, an officer frisked two suspects solely because a robbery occurred several blocks away. *Brown*, 448 F.3d at 243. The officer said he planned to frisk the suspects regardless of their compliance. *Id.* The court held officers lacked reasonable suspicion to frisk the suspect given the totality of the circumstances because "each of the factors argued to support reasonable suspicion . . . and frisk him . . . underwhelms." *Id.* at 252. Similarly, Burnett patted down Mr. Brown primarily due to suspected credit card fraud, and each justification for the frisk underwhelms. A reasonable officer in Burnett's position would not have reasonable suspicion Mr. Brown was armed and dangerous at the time of the frisk.

Considering the totality of the circumstances, a reasonable officer in Burnett's position would not have reasonably suspected Mr. Brown was armed and dangerous at the time of the frisk. Given Burnett's articulated reasons, his description of Mr. Brown reaching below his seat, Mr. Brown's compliance with Burnett's orders, and Mr. Brown's empty hands upon exiting the

vehicle, Burnett lacked reasonable suspicion Mr. Brown was armed and dangerous at the time of the frisk. Burnett, therefore, unreasonably frisked Mr. Brown.

b. The credit cards obtained from Mr. Brown due to the illegal frisk must be suppressed under the "fruit of the poisonous tree" doctrine.

Because Burnett unreasonably frisked Mr. Brown, the evidence obtained from Mr. Brown due to the frisk must be suppressed. Burnett frisked Mr. Brown so Mr. Brown has standing to object to the fruits of the poisonous tree.

When police make an illegal search and there is a factual nexus between the illegal search and the evidence obtained, the evidence is improperly obtained and is fruit of the poisonous tree that must be suppressed.

The credit cards retrieved from Mr. Brown's sock are the fruit of the illegal stop. There is no question of the factual nexus between the frisk and the evidence obtained. *See Mosely*, 454 F.3d at 256 ("Where the traffic stop itself is illegal, it is simply impossible for the police to obtain the challenged evidence without violating the passenger's Fourth Amendment rights."). Thus, this Court must suppress the evidence.

Applicant Details

First Name	**Ecclesiaste**
Last Name	**Desir**
Citizenship Status	**U. S. Citizen**
Email Address	**edesir@pennlaw.upenn.edu**
Address	**Address** Street **4404 Foster Avenue** City **Brooklyn** State/Territory **New York** Zip **11203** Country **United States**
Contact Phone Number	**7742086784**

Applicant Education

BA/BS From	**Howard University**
Date of BA/BS	**May 2019**
JD/LLB From	**University of Pennsylvania Carey Law School** **https://www.law.upenn.edu/careers/**
Date of JD/LLB	**May 15, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**University of Pennsylvania Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Keedy Moot Court Competition** **NBLSA Thurgood Marshall Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Professional Organization

Organizations	**Just the Beginning Organization**

Recommenders

Lee, Sophia
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215-573-7790
Scirica, Anthony
ascirica@law.upenn.edu
215-597-2399
Zauzmer, Robert
bob.zauzmer@usdoj.gov

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Ecclesiaste Ginord Desir

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June 1, 2023

The Honorable Judge Jamar K. Walker
Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Jamar K. Walker,

As a rising third-year law student at the University of Pennsylvania Law School, I am writing to express my interest in the clerkship opportunity currently available and any future positions that may become available. My passion for building a more equitable justice system motivated me to pursue a legal career, and I believe that my skills and qualifications align with the requirements of this role.

Prior to law school, I worked in Executive Search for two years, where I developed exceptional time management and interpersonal skills. During my first two summers of law school, I worked as a capital market summer associate at Greenberg Traurig, where I focused on securities regulation issues. Currently, I am a litigation summer associate at Skadden, Arps, Slate, Meagher & Flom, where I work on matters relating to corporate criminal liability, antitrust, contract, corporate, and securities law.

In addition to my legal experience, I have also enhanced my writing and editing skills through my role as **Editor-in-Chief** of the *University of Pennsylvania Law Review*. My research and writing expertise led me to a deeper understanding of federal justiciability and constitutional litigation, as evidenced by my comment submitted for publication in the *Law Review*. As **President** of Penn Law's Black Law Students Association (BLSA), I developed management and advocacy skills, advocated for advancing equity, and successfully lobbied for the creation of five full-tuition scholarships to be awarded to incoming first-year students whose education, experience, and professional commitments advanced racial justice. As a teaching assistant, I crafted comprehensive multiple-choice questions that effectively tested students' understanding and critical thinking skills. Additionally, I meticulously prepared class notes, ensuring that each lecture was well-documented and easily accessible to students.

Although I had many responsibilities, I also had a full schedule of courses. I have studied Constitutional Litigation (a Federal Court equivalent), Administrative Law, Judicial Decision Making, Antitrust, Evidence, Conflicts of Law, and Appellate Advocacy - an advanced legal writing course. In the upcoming year, I plan to take Federal Courts, Constitutional Criminal Procedure, and Employment Law.

I believe that working alongside you as a law clerk will provide me with invaluable insights into the court's operations and help me refine my skills as a legal advocate. I am committed to conducting thorough research and analysis to support the court's crucial work, and I look forward to learning from your guidance and expertise.

Accordingly, please find enclosed my resume, transcript, writing sample, and letters of recommendation from Professor Sophia Lee (slee@law.upenn.edu), The Honorable Anthony Scirica (ascirica@ca3.uscourts.gov), and Professor Robert Zauzmer (bob.zauzmer@usdoj.gov). Thank you for considering my application, and please do not hesitate to let me know if you require any additional information from me.

Respectfully,
Ecclesiaste Desir
Editor-in-Chief, Vol. 172, *University of Pennsylvania Law Review*
Candidate of Juris Doctor 2024

ECCLESIASTE GINORD DESIR

(774) 208-6784 |edesir@pennlaw.upenn.edu|4404 Foster Avenue, Brooklyn, NY, 11203

EDUCATION

University of Pennsylvania Law School, Philadelphia, PA **May 2024**
Juris Doctor Candidate
Activities: *President*, Black Student Law Association; Member, Penn Law BLSA Moot Court Team
Honors: Editor in Chief, Vol. 172, *University of Pennsylvania Law Review*; Associate Editor, Vol. 171, *University of Pennsylvania Law Review*

Howard University, Washington, D.C. **May 2019**
Bachelor of Arts, *summa cum laude*, in Political Science with a History minor
Cumulative GPA: 4.0
Activities: Howard University Blockchain Labs, **Co-founder**; WHBC 96.3 Radio System, Radio Personality
Awards: ETS Presidential Scholarship

Milton Academy, Milton, MA **2011 – 2015**

Prep for Prep, New York, NY **2010 – Present**
A highly selective leadership development program that incorporates a rigorous 14-month academic component to prepare students for placement in leading independent schools and works closely with them through high school and beyond.

EXPERIENCE

Skadden Arps, Slate Meagher & Flom LLP, New York, NY **May 2023 – July 2023**
Summer Associate

Greenberg Traurig, Fort Lauderdale, FL **May 2022 – July 2022**
LCLD Summer Associate (Capital Markets, Inaugural 1L Associate for the Capital Markets practice)
- Drafted Post Effective Amendments for S-1 to S-3 SEC Forms.
- Drafted Form 8-ks as a response to 8-K triggering events.
- Prepared and reviewed S-1s and S-8s.
- Prepared Registration Rights Agreements for PIPEs.
- Drafted and reviewed Corporate Governance Guidelines.
- Created client Annual Meeting Documents (e.g., meeting scripts, board resolutions, minutes documents, etc.).

Egon Zehnder, Dallas, TX **February 2021 – August 2021**
Business Analyst
- Partnered with experts and consultants on client mandates, projects, pitch preparation, and knowledge management.
- Monitored and tracked relevant market developments in a segment, including company updates and new hires.
- Created high-quality client documentation (e.g., candidate profiles, role specifications, company mappings, etc.).
- Identified, calibrated on, and prioritized potential candidates through the firm network, market research, and research resources.
- Conducted market research to shape the approach to search and develop a list of target companies.

Korn Ferry, Dallas, TX **January 2020 – February 2021**
Associate Recruiter
- Defined, designed, and implemented the sourcing strategy for building talent pools of specific candidate profiles.
- Consulted clients to clearly define and develop a compelling employee value proposition and incorporate this information into the sourcing strategy framework.
- Developed effective candidate relationship management strategies to sustain strong working relationships with potential candidates.

Interests and Languages

Language: Fluent in Haitian Creole
Interest: History: Classical Antiquity; Cinema (Thrillers, Coming-of-age); Weightlifting and Cardio.

Record of: Ecclesiaste G Desir
Penn ID: 53899228
Date of Birth: 01-JAN
Date Issued: 05-JUN-2023

U N O F F I C I A L Page: 1

The University of Pennsylvania

Level:Law

Primary Program
Program: Juris Doctor
Division : Law
Major : Law

SUBJ	NO.	COURSE TITLE	SH	GRD	R
INSTITUTION CREDIT:					
Fall 2021					
Law					
LAW	500	Civil Procedure (Wolff) - Sec 1	4.00	B+	
LAW	502	Contracts (Galbraith) - Sec 1	4.00	B	
LAW	504	Torts (Klick) - Sec 1B	4.00	B	
LAW	510	Legal Practice Skills (Edwards)	4.00	CR	
LAW	512	Legal Practice Skills Cohort (Vidyarthi)	0.00	CR	
Ehrs: 16.00					
Spring 2022					
Law					
LAW	501	Constitutional Law (Shanor) - Sec 1	4.00	B	
LAW	503	Criminal Law (Ferzan) - Sec 1B	4.00	B+	
LAW	510	Legal Practice Skills (Edwards)	2.00	CR	
LAW	512	Legal Practice Skills Cohort (Vidyarthi)	0.00	CR	
LAW	583	Judicial Decision-Making (Scirica)	3.00	A-	
LAW	601	Administrative Law - 1l (Lee)	3.00	A-	
Ehrs: 16.00					
Fall 2022					
Law					
********** CONTINUED ON NEXT COLUMN **********					

SUBJ	NO.	COURSE TITLE	SH	GRD	R
Institution Information continued:					
LAW	6070	Antitrust (Hovenkamp)	3.00	B	
LAW	6120	Appellate Advocacy (Zauzmer)	3.00	A	
LAW	6170	Conflict of Laws (Roosevelt)	3.00	B	
LAW	6740	Constitutional Litigation (Kreimer)	4.00	A-	
LAW	8020	Law Review - Associate Editor	0.00	CR	I
Ehrs: 13.00					
Spring 2023					
Law					
LAW	6310	Evidence (Rudovsky)	4.00	B+	
LAW	7430	Complex Litigation (Scirica/Duncan)	3.00	B	
LAW	8020	Law Review - Associate Editor	0.00	CR	I
LAW	8130	Appellate Advocacy Preliminary Competiton (Gowen)	1.00	CR	
LAW	9990	Independent Study (Lee)	3.00	A-	I
LAW	9990	Teaching Assistant (Lee)	2.00	CR	I
Ehrs: 13.00					

********** TRANSCRIPT TOTALS **********

	Earned Hrs
TOTAL INSTITUTION	58.00
TOTAL TRANSFER	0.00
OVERALL	58.00

********** END OF TRANSCRIPT **********

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Clerkship Applicant Ecclesiaste Desir

Dear Judge Walker:

Ecclesiaste Desir is a talented legal writer and thinker who inspires great confidence. He has excelled in some of the law school's hardest classes and demonstrated excellent legal writing. Mature beyond his years, his peers look to him as a leader. He will be an able and committed clerk who will bring steadiness and a strong work ethic to the position. I recommend him to you for a clerkship with great enthusiasm.

Ecclesiaste is a strong legal writer and able legal analyst. Administrative Law is a challenging class, particularly for first-year students. Despite those challenges—and a strictly enforced curve—Ecclesiaste earned a high A- in the class. I design my Administrative Law exam to mirror real world assignments: it is a word-limited, 24-hour take home. To do well requires not only spotting and analyzing issues well, but also excellent writing and sound judgment as to which issues to focus on and at what depth. Ecclesiaste demonstrated all these qualities, spotting every issue and providing strong analyses across the board as well as earning my highest marks on several. He even earned extra points for the high quality of his legal writing. Based on his exam, I would expect him to handle well the writing and analytic demands of a clerkship.

Ecclesiaste is a versatile as well as strong writer. In addition to an issue spotter, my Admin exam required students to write a short argumentative essay. Ecclesiaste had to analyze the Supreme Court's recent separation of powers decisions, including the presidential removal powers cases culminating in Collins v. Yellen and the non-delegation arguments in Gundy. Ecclesiaste wrote an excellent essay, earning my highest marks. I am now supervising the writing of his student comment for our Law Review. He is analyzing how the Roberts Court has mobilized efficiency arguments to limit Section 1983 litigation. While I have only seen his proposal and outline thus far, I have been impressed with his strong, clear writing. He has also shown excellent initiative, solid research skills, and outstanding organization. I've been impressed as well with his openness and responsiveness to feedback. He has the strong and versatile writing as well as the work ethic a clerkship requires.

Ecclesiaste is also quick on his feet and a strong communicator. He earned my highest marks when cold called in Administrative Law. He was judicious with his voluntary participation in class but every time he spoke, his contributions were high quality, also earning my highest marks. I was impressed with his effective use of office hours the several times he attended. He listened carefully and, as in class, made efficient and effective use of his questions. Based on his strong performance in Administrative Law, I invited Ecclesiaste to serve as a teaching assistant in Administrative Law this year. He has been a responsive and responsible TA, collaborating well with his co-TAs and impressing me with his high level of professionalism.

Ecclesiaste can rise to a challenge. A summa cum laude graduate of Howard University, he has done the best in law school in some of its hardest classes. My colleagues at other law schools are surprised we teach Admin as a first-year course, given its difficulty, yet Ecclesiaste performed excellently. He also did very well in Constitutional Litigation, a class that is beloved by our students but notorious for its heavy workload and, given its overlap with Federal Courts, difficult material.

Ecclesiaste is a natural leader who inspires great confidence. Ecclesiaste's peers selected him to serve as Editor-in-Chief of the University of Pennsylvania Law Review, a tremendous honor. He has also served this year as President of the Black Law Students Association. To meet Ecclesiaste is to understand why his peers have such faith in him: he has impressive poise, projects quiet strength, and conveys reassuring calmness. He will inspire similar confidence and be a steadying presence in Chambers.

Ecclesiaste is also lovely. A Brooklyn native and the middle child in a family of five, he has a good-natured unflappability and warm smile that can set people at ease. He has the tested character of a former competitive wrestler and the infectious enthusiasm of an avid sports fan (for him, the New York Knicks and Giants). He is intellectually curious and speaks enthusiastically about tackling a knotty legal issue.

Ecclesiaste is a talented legal writer and analyst with the judgment, work ethic, and organizational skills a clerkship demands. Mature, even keeled, and steadfast, he will be a welcome addition to Chambers. Excited for the growth a clerkship will produce, he will be a delight to mentor. I recommend him to you for a clerkship with great enthusiasm.

Sincerely,

Sophia Z. Lee
Professor of Law
Tel.: (215) 573-7790
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UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Clerkship Applicant Ecclesiaste Desir

Dear Judge Walker:

I am delighted to write a letter of recommendation on behalf of Ecclesiaste Desir, a student at the University of Pennsylvania Carey Law School, who has applied for a clerkship in your chambers. Ecclesiaste (or Clay) is on his way to compiling a superb record at Penn Law School. He has just been selected Editor-in-Chief of the University of Pennsylvania Law Review.

I know Clay well, having taught or co-taught him in two courses at Penn Law School: Judicial Decisionmaking in his first year and Complex Litigation this Spring. In both classes Clay was superbly prepared and enjoyed engaging the most difficult issues with intelligence and insight. In both classes, he asked penetrating questions and gave thoughtful responses.

In the 1L course on Judicial Decisionmaking, Clay wrote an excellent examination demonstrating his understanding of the legal and policy implications of the course material. His examination was superbly written – clear, well-structured, and thoughtful. I gave him the grade of A-.

In the course on Complex Litigation, we delved into the world of complex litigation – joinder, MDL, class actions, mass aggregation and bankruptcy. In this class, Clay was well prepared and was a frequent participant asking good questions and giving good responses.

Clay is a wonderful young man, intelligent, perceptive, mature, self-directed, and hard working. He has an engaging personality and is a natural leader. Clay has been a frequent visitor in office hours, and I have enjoyed getting to know him. Clay is always curious, positive, and optimistic. He is liked and admired by all who know him and would fit well in chambers.

I believe Clay will be an excellent law clerk and am pleased to recommend him most highly.

Thank you for your consideration.

Sincerely,

Anthony J. Scirica
Tel: 215-597-2399

ROBERT A. ZAUZMER
Assistant United States Attorney
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June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Clerkship Applicant Ecclesiaste Desir

Dear Judge Walker:

I am pleased to recommend Ecclesiaste ("Clay") Desir for a judicial clerkship.

I am an Assistant United States Attorney in Philadelphia. I have served as a federal prosecutor for 33 years, and have served during the past 25 years as the chief appellate attorney for the office. In addition, I served a one-year detail in 2016 as the Pardon Attorney in the Department of Justice in Washington, DC, overseeing the completion of President Obama's clemency initiative.

I also teach a fall seminar on appellate advocacy at the University of Pennsylvania Carey Law School. In that capacity, I met Clay, who was one of my students in the seminar during the fall of 2022. Clay earned an A mark in a very competitive group, and impressed me throughout the semester.

The course at the law school presented oral and written assignments principally related to three cases, two civil and one criminal. One matter involved a motion to certify for interlocutory appeal a district court's order denying summary judgment in a civil rights matter. Another was a government appeal of a district court ruling granting the suppression of evidence in a criminal prosecution, in which the students fully briefed and argued the case in a moot court setting. The third case presented a complex question of habeas jurisdiction, centered on whether a defendant's latest filing was properly dismissed as a successive motion instead of being treated as a motion for reconsideration of an earlier ruling. This matter was an actual appeal pending before the United States Court of Appeals for the Third Circuit, and I assigned the students, in advance of the argument before the Court of Appeals, to prepare a bench memo identifying the key issues and contentions in the appeal, and suggesting the appropriate outcome.

Clay did well in both the written and oral advocacy portions of the class. What most impressed me is his determination, sincerity, and humility. He was already a good writer when the class began, but he repeatedly expressed to me his desire to become even better, and gather all advice he could to advance that goal. Sure enough, he took all recommendations to heart, and made evident improvement as the class progressed. He writes with a distinctive, colloquial voice, that can be very engaging when presenting sometimes-dry legal material.

Clay's efforts in the oral advocacy portion of the course were also impressive. I appreciate that oral advocacy is not part of a clerk's responsibility, but I believe it is notable that Clay demonstrated skills that are pertinent to a clerk's role. He is very effective at presenting his views orally, in a clear and compelling fashion. I described his lengthy oral argument at the conclusion of the class as "exceptional," as he combined a comfortable and persuasive speaking style with mastery of the relevant material.

I must add that Clay appears to me to be a natural leader, whose intelligence and personality are most compelling. I am not surprised that he has achieved leadership positions at Penn and throughout his legal career, and I told him that I look forward to seeing him in important positions of community leadership in the future.

For all of these reasons, I believe that Clay will be an able judicial clerk and later an excellent attorney and public leader. Please let me know if I may be of further assistance in the consideration of his application.

Respectfully yours,

/s Robert A. Zauzmer
ROBERT A. ZAUZMER

Ecclesiaste Ginord Desir

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Overview of Writing Sample:

The following document serves as a summary of a bench memo created for a case involving Darnell Doss, who is challenging a ruling by the United States District Court for the Middle District of Pennsylvania that favored the United States. The case revolves around whether a pro se post-habeas submission can be considered a Rule 60(b) motion if it challenges procedural deficiencies in a previous habeas proceeding.

The bench memo begins by providing an overview of the case, summarizing Doss's previous pro se habeas proceeding and his subsequent letter to the district court, which raised new arguments based on procedural deficiencies. The memo then outlines the legal questions that both the appellant and appellee face in this case, including matters related to the scope of Rule 60(b) relief, the standard of review, and the district court's jurisdiction over the case.

Next, the memo discusses the relevant legal standards and precedents for interpreting Rule 60(b) motions, including whether pro se submissions challenging procedural deficiencies in a prior habeas proceeding should be treated differently from other Rule 60(b) motions. The memo analyzes the potential procedural and jurisdictional hurdles raised by the government's argument that the district court lacked jurisdiction over the pro se submission as a Rule 60(b) motion.

Finally, the memo concludes by summarizing the legal and factual issues at play in the case and offering recommendations for how the court might resolve the issue of whether a pro se post-habeas submission challenging procedural deficiencies in a prior habeas proceeding should be classified as a Rule 60(b) motion. Overall, the bench memo aims to provide a comprehensive analysis of the legal issues in this complex case.

It is worth noting that the bench memo was an assignment for my Appellate Advocacy class, and I only received generalized feedback for the assignment. The changes did not provide in-line or organizational edits.

MEMORANDUM

To: Professor Zauzmer

From: Ecclesiaste Desir

Date: October 11, 2021

Subject: *Doss v. U.S.*

INTRODUCTION

Darnell Doss is appealing a decision in favor of the United States made by the United States District Court for the Middle District of Pennsylvania. The core issue is whether a pro se post-habeas submission can be treated as a Rule 60(b) motion if it challenges procedural deficiencies in a prior habeas proceeding. Doss argues that it should, while the Government asserts that the district court lacked jurisdiction to consider Doss's January 2020 letter as a motion to reopen under Rule 60(b).

To grasp the context of this case, we must examine Doss's prior pro se habeas proceeding. There, Doss raised claims of ineffective assistance of counsel and violations of due process in his challenge of a drug-related conviction. Yet the district court rejected all his arguments, and the Third Circuit upheld that decision.

Later, in January 2020, Doss submitted a letter to the district court that proposed new arguments based on alleged procedural deficiencies in his earlier habeas proceeding. The district court construed this letter as a Rule 60(b) motion to reopen. The court ultimately rejected Doss's contentions, stating that he had not established any procedural errors in the previous proceeding.

The central issue on appeal is whether a pro se post-habeas submission that challenges procedural deficiencies in a previous habeas proceeding should be treated as a Rule 60(b) motion. Doss maintains that it should, while the Government argues that Rule 60(b) only applies to procedural errors in the habeas context. The resolution of this issue depends on the interpretation of relevant legal standards, which we will explore in later sections.

QUESTION PRESENTED

For a district court, in the habeas context, to have jurisdiction to consider a motion to reopen under Rule 60(b), the claim must address a procedural error. Doss's claim compelled the district court to invoke the Strickland analytical framework and an analysis of the applicable law—a substantive analysis. So does the district court lack jurisdiction to consider a motion to reopen under Rule 60(b) in the habeas context?

FACTUAL BACKGROUND

On March 15, 2017, Darnell Doss was convicted of a single count of distribution and possession with intent to distribute cocaine based in violation of 21 U.S.C § 841(a)(1).[1] In response, Doss provided the government with a guilty plea agreement – finalizing his conviction.[2] The guilty plea agreement contained a direct appeal waiver, not a collateral attack waiver.[3] After Doss signed the plea agreement, the court sentenced him.

The district court sentenced Doss to 151 months in prison as he signed a plea agreement with a direct appeal waiver and collateral attack waiver.[4] Doss did not file a direct appeal of his conviction or sentence to the court after his sentencing. He requested that Mr. Yaninek file a notice of appeal on his behalf, but Yaninek failed to do it. As a result of this failure, Doss requested that the district court provide him leave to appeal "*nunc pro tunc*."[5]

On July 27, 2015, Doss wrote a letter to the district court requesting copies of several documents.[6] The day after the district court received the letter, it found Doss's letter as a motion to extend the time for filing a notice of appeal.[7] But the district court denied the motion as the deadline for granting extensions expired.[8] In March 2016, Doss, in response to the denial, filed his first collateral attack on his sentence and conviction—a 28 U.S.C § 2255 motion.[9] He asserted

[1] Judgment, Appx71
[2] Plea Agreement, Appx. 46.
[3] Id.
[4] Appx. 72.
[5] July 27, 2020, Appx. 78.
[6] July 27, 2020, letter, Appx.78
[7] Order, Appx. 82.
[8] Id.
[9] Motion, Appx. 90.

in his motion that he received ineffective assistance of counsel based on four claims. The most relevant claim: prior counsel failed to file a notice of appeal.[10]

So after Doss's motion and the government's response, the district court noted that Doss's plea agreement contained a direct appeal waiver, not a collateral attack waiver. So the district court examined whether Doss's counsel provided ineffective assistance of counsel.[11] The Court used the *Strickland* analytical framework to determine this issue.[12] And the court found that Doss's counsel provided effective assistance to him as to file a direct appeal would breach his signed plea agreement.[13] After the district court's finding, Doss attempted to appeal the decision, but it was denied.[14]

With no other form of recourse after this denial of certification, Doss waited eleven months after the *Garza* decision to send a letter to the district court.[15] He requested the district instruct him on how to proceed and "re-state" his appeal.[16] And the district court responded that his letter was a second or successive § 2255 motion that the appellate Court must authorize.[17]

DISCUSSION

Doss, the appellant, argued that the court should follow the Fifth and Eleventh Circuits in holding that denying a habeas petition is a procedural ruling subject to challenge under Rule 60(b).[18] According to the Fifth and Eleventh Circuit holdings, a habeas petition is considered a procedural ruling because it turns on the validity and effect of an appellate waiver in a plea agreement.[19]

In this case, Doss applies the *Garza v. Idaho* ruling. Doss cites that *Garza* supports the Fifth and Eleventh holdings as it characterizes waivers as "procedural devices," incapable of "serv[ing] as an absolute bar to all appellate claims."[20] In other words, *Garza* suggests that issues

[10] Id. at 93, 102-03.
[11] Memorandum, Appx5-13.
[12] Id.
[13] Id.
[14] Id.
[15] January 22, 2020, Letter, Appx. 35.
[16] Id.
[17] Order, Appx. 40.
[18] See Webb v. Davis, 940 F.2d 892, 898-99 (5th Cir. 2019); Pease v. United States, 768 F. App'x 974, 976 (11th Cir. 2019).
[19] Id.
[20] 139 S. Ct. 738, 744-45, 750

about waivers are procedural errors, not substantive ones. Doss further argues that *Garza* applies here as the district court denied his initial habeas petition based on his waiver application. *Garza* held that an ineffective counsel presumption does apply when there is a failure to file a requested notice of appeal, no matter if the signed plea agreement contained an appeal waiver.[21] Doss then concludes his argument by informing the court that it possesses the jurisdiction to construe Doss's January 2020 Letter as a Rule 60(b) motion, revisit its holding on Doss's initial petition, and reevaluate his waiver application properness. But the Appellee, the Government, thwarts many of Doss's points.

The Government presents a well-crafted argument to combat Doss's. The Government contends *Gonzalez v. Crosby* held that district courts might only use Rule 60(b) as a mechanism to reevaluate a prior collateral ruling when the claim exists as a procedural issue, not a substantive one.[22] And *Gonzalez* further holds that the district court must treat substantive claims as second or successive petitions.[23] The Government, therefore, contends that *Gonzalez* applies here as the district court recognized the existence of a valid direct appeal waiver in Doss's plea agreement and treated that as an essential fact bearing on the ineffective assistance of counsel analysis. But the district court did not apply the waiver in any way that would bar it from examining Doss's substantive ineffectiveness claims "on the merits." The district court did, however, apply the *Strickland* analytical framework and an applicable law analysis to Doss's claim.

Applying these two analyses suggests that the district court's holding relied on the substantiveness of Doss's claim and not any procedural errors that arose from it. So the claims exist as a procedural issue, not a substantive one; the district court then lacks any jurisdiction to consider a motion to reopen under Rule 60(b) in the habeas context.

Ultimately, the district court lacks the jurisdiction to consider a motion to reopen under Rule 60(b) as the district court applied the *Strickland* analytical framework and an analysis of the law that applies to Doss's claim. Those analyses rendered the claim as a substantive one. The district court treats a substantive claim as a second or successive § 2255 petition. So the district court cannot consider Doss's claim as a Rule 60(b) motion.

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[21] Id. at 749.
[22] 545 U.S. 524
[23] Id.

Did the District Court "Apply" the Appeal Waiver Contained in His Plea Agreement in Any Procedural Way to Bar His Motion?

A post-habeas petition is a legal process where a defendant who has already been found guilty and exhausted their direct appeal attempts to challenge their conviction or sentence. Post-conviction relief can be sought under 28 U.S.C. § 2255. The Third Circuit has held that a defendant may file a second or successive § 2255 motion only if they have obtained certification from the appropriate court of appeals that the motion contains newly discovered evidence or a new rule of constitutional law, made retroactive by the Supreme Court, that was previously unavailable. This requirement aligns with the Supreme Court's decision in *Magwood v. Patterson*, 561 U.S. 320 (2010), which held that a § 2255 motion is considered "second or successive" if a prior petition was decided on the merits. Recently, the Supreme Court ruled in *Garza v. Idaho* 139 S. Ct. 738, 746 (2019), that a defendant's signed appeal waiver cannot serve as an absolute bar to all appellate claims. This ruling suggests that issues about waivers are procedural errors, not substantive ones.

However, the court in *Gonzalez v. Crosby* 545 U.S. 524 (2005) held that district courts might only use Rule 60(b) as a mechanism to reevaluate a prior collateral ruling when the claim exists as a procedural issue, not a substantive one. It's important to distinguish between procedural and substantive issues when deciding if a prior ruling can be challenged using a Rule 60(b) motion. If a pro se habeas petition, claiming ineffective assistance of counsel, has already been denied, the district court must determine the Rule 60(b) status of any new filing.[24] The new filing must address procedural flaws filed in the district court.[25]

Doss argues that a pro se post-habeas submission can be construed as a Rule 60(b) motion when it challenges alleged procedural errors. Doss also claims that the court understood his letter from January 2020 was a request to file another § 2255 motion. Doss argues that the district court misunderstood the content of his letter. He argued that the procedural error lay with the district court failing to look beyond "the label" applied by the pro se party to the substance of the Letter. And that the district court should have evaluated whether the Letter could be considered a Rule 60(b) motion. Here, Doss's argument that the district court's omission in failing to assess the

[24] United States v. Thomas, 713 F.3d 165, 168-69 (3d Cir. 2013).
[25] Gonzalez, 545 U.S., at 532-33, 535-36.

Letter as a Rule 60(b) motion, rather than the substance of the letter itself, constituted a procedural error. While this argument holds merit, it lacks the depth and nuance of the Government's argument.

The Government posits that Doss's direct appeal is merely a potential procedural error as the waiver only prohibited a direct appeal to the Third Circuit – not the district court. Furthermore, no collateral attack waiver prohibited the district court from considering Doss's § 2255 motion. The Government advances that since the waivers did not bar a collateral attack but only a direct appeal to the Third Circuit, Doss cannot demonstrate that the district court employed a procedural bar to avoid addressing the motion "on the merits." Doss neglects to address the substantiveness of an ineffective assistance claim that depends on prior counsel's unwillingness to file a notice of appeal. Therefore, the Government maintains that the absence of a collateral attack waiver and the substantive nature of this ineffective assistance claim demonstrate that the district court did not utilize a procedural bar when evaluating Doss's Letter.

Doss neglected to address how the lack of a collateral attack waiver did not bar the district court's consideration of his § 2255 motion. This gap in his argument creates a substantive issue, as the district court could review the motion on the merits. The district court's review of the motion on the merits suggests that it conducted a substantive analysis by using the *Strickland* analytical framework to determine the merit of Doss's ineffective assistance claim. Therefore, it seems the government is correct regarding this issue, as the district court did not apply the appeal waiver in any way that invoked a procedural bar.

Did Doss's January 2020 Letter Attack the Procedure Used to Dispose of His § 2255 Motion?

Doss argues that his letter challenged the district court's focus on the "mere existence" of an appeal waiver.[26] He also argues that the district court used the waiver as an absolute bar to the appellate court.[27] Doss asserts that his letter did not add a new theory of relief from his conviction or challenge the validity of his direct appeal waiver.[28] But he confined the letter to a waiver application question—pointing to a procedural error by the district court—like *Webb* and *Pease*.

[26] Appendix, JA0035
[27] Id.
[28] JA0035-37

So Doss argues that his January 2020 Letter attacked the procedure used to dispose of his § 2255 motion. But the government argues that the letter does not attack the procedure used by the district court.

The government asserted that Doss tried to use a change in the substantive law to get the district court to reevaluate its previous holding under the previous law—about its denial of his § 2255 letter. And the district court was correct to reevaluate the change in the law. But *Gonzalez* held that appealing a denial of a § 2255 motion based on a change in substantive law constitutes not a procedural error but a substantive one.[29] So the government argued that the example in *Gonzalez* regarding when the appeal of a § 2255 motion for a change in substantive law is like what Doss did with his letter. Doss wanted to apply the *Garza*, *Webb*, and *Pease* here as precedent seemingly changed with *Garza*. But even if the precedent changed with *Garza*, reevaluating the change would be a substantive issue. The government analysis here seemed correct as Doss tried to apply the new law (*Garza*) to the previous district court ruling, which would be a substantive ruling, according to *Gonzalez*.[30]

Is The Denial of Doss's Initial § 2255 Motion Substantive?

Doss makes a compelling argument that the court should adopt the Fifth and Eleventh Circuit application in *Gonzalez*, which holds that a Rule 60(b) motion might appropriately challenge a procedural, waiver-based denial of an initial habeas petition.[31] He also contends that *Garza* held that an appeal waiver might give rise to a procedural ruling when the claim asserts ineffective assistance of counsel for failure to file a notice of appeal.[32] This argument relied on Doss's assertion that the district court denied his motion based on the presence of a direct appeal waiver in the plea agreement—a procedural issue. Consequently, Doss posits that the district court's review of the waiver and its use in resolving the Letter's Rule 60(b) status constitutes a procedural decision. According to Doss, the ruling in his favor by the Third Circuit would not be unprecedented, given that other circuits and even the Supreme Court have issued comparable rulings. However, the Government does not agree with Doss's contentions.

[29] Gonzalez, 545 U.S. at 532-33.
[30] Id.
[31] Webb, 940 F.3d at 898; Pease, 768 F. App'x at 976; Gonzalez, 545 U.S. at 531-32.
[32] 139 S. Ct. 738, 744-45, 750.

The Government argued that the district court's application of the *Strickland* analytical framework to deny Doss's initial § 2255 motion constituted a substantive decision. The argument started with the district court assessing the counsel's ineffective assistance. As there is no challenge to the direct appeal waiver by Doss, the district court reasoned that Doss's counsel was within reason to file for an appeal. Applying for an appeal would have Doss and his counsel violate the plea agreement. The Government then argued that the district court did not refuse to look at counsel effectiveness but incorporated the appeal waiver in its ruling as a reason for Mr. Yaninek, Doss's counsel, not to file it. The government argued that the district court discussed the merits of Doss's three other "asserted bases" for claiming he received ineffective assistance from counsel, which further supported that the district court's ruling was substantive, not procedural. The government's argument here is, therefore, correct. Doss made several legal analytical errors in this case.

He misunderstood both the presiding case law and the facts at hand and failed to address the district court's substantive analysis. The government does apply the *Strickland* framework, a substantive analysis, and finds that counsel was effective. Mr. Yaninek, counsel to Doss, knew that the plea agreement contained a direct appeal waiver. For him to file, a direct appeal would have him violate the plea agreement. It appeared Yaninek had no desire to conduct that task as it would violate the plea agreement. And according to the district court, Yaninek remained "well within the wide range of reasonable professional assistance." So Doss's lack of addressing the district court's application of *Strickland* does render his argument weak. And it does not refute the government's analysis.

Should the Court Remand to Provide the District Court an Opportunity to Apply Recent Supreme Court Precedent?

Doss argues that the court should remand to provide the district court with an opportunity to apply the recent Supreme Court precedent. Rule 60(b) provides a well-recognized avenue for the district court to consider a change in decisional law and other equitable factors to correct an earlier procedural ruling.[33] Doss continues to argue that the district court is the appropriate forum first to analyze the equitable circumstances in deciding whether to afford relief as the district court

[33] Satterfield v. District Attorney of Philadelphia, 872 F.3d 152, 162 (3d Cir. 2017).

oversees the briefing and factfinding involved in a request for Rule 60(b) relief. But the government argues that this case should not go to the district court as Doss has misconstrued the presiding case law.

The government argued that the cases Doss cited did not support that a decision is automatically procedural because it refers to an appeal waiver regardless of its role in the analysis. The cases only support that a § 2255 motion denial is procedural as a court uses waiver to bar consideration of the merits raised by a defendant. And a reading of these cases seems correct as the district courts in these cases did not provide a substantive analysis via the *Strickland* analytical framework to determine counsel effectiveness. In addition, the government's argument that Doss misconstrued the caselaw remains plausible. The district court here applied a substantive analysis and ruling in denying Doss's Letter. So the Court should not remand the case to the district court as the precedent Doss used is not analogous to this case.

Conclusion

In short, the issue presented in this case is whether a pro se post-habeas submission challenging procedural deficiencies in a prior habeas proceeding can be classified as a Rule 60(b) motion. After a thorough analysis of the legal and factual issues at play, I recommend that the district court's denial of Doss's initial § 2255 motion constituted a substantive decision. Therefore, the district court lacked the jurisdiction to consider Doss's January 2020 Letter as a Rule 60(b) motion. While Doss makes a compelling argument that the court should adopt the Fifth and Eleventh Circuit application in *Gonzalez*, this case is distinguishable from those cases because the district court here applied a substantive analysis and ruling in denying Doss's Letter. Ultimately, the district court applying the *Strickland* analytical framework suggests that Doss's claim was not a procedural error but a substantive one. Therefore, the district court must treat it as a second or successive § 2255 petition.

Overall, this case highlights the complex and nuanced legal issues surrounding post-habeas proceedings and the application of Rule 60(b) motions. It also underscores the importance of understanding the substantive versus procedural nature of legal claims and the impact that has on a court's jurisdiction over a case.

Question for Counsel at Oral Argument

Question for Appellants, Darnell Doss

1. Do you consider the District Court's use of the *Strickland* analytical framework as a substantive analysis? If so, how is the district court's ruling not substantive?
2. Does a pro se post-habeas submission challenging procedural deficiencies in a prior habeas proceeding fall under the purview of Rule 60(b) if it seeks to reopen the earlier proceeding?
3. You contend that this court should adopt Gonzalez's Fifth and Eleventh Circuits application. Why should this court adopt these cases if the district court in neither case used the *Strickland* analysis

Questions for Appellees, The United States

1. How did the district court look beyond "the label" of the waiver if all it did was assume that Mr. Yaninek did not file the appeal because he knew there was a direct appeals waiver so that it would breach the plea agreement? How does this case differ from *Webb* and *Pease*?
2. Given the facts here, how should the court apply *Garza*? As that case held, a direct appeal waiver might give rise to a procedural ruling when the claim asserts ineffective assistance of counsel for failure to file a notice of appeal.
3. Doss argued that it was the district court's failure in not assessing whether the Letter constituted a Rule 60(b) motion, not the substance of the letter itself, that was the procedural error. If the district court failed to determine whether the Letter constituted a Rule 60(b) motion, then is that not a procedural error, as the court did not address the issue?

Applicant Details

First Name	**Hunter**
Last Name	**Dickerson**
Citizenship Status	**U. S. Citizen**
Email Address	**hwd4@duke.edu**
Address	**Address** Street **2530 Erwin Rd, Apt. 224** City **Durham** State/Territory **North Carolina** Zip **27705** Country **United States**
Contact Phone Number	**7025966370**

Applicant Education

BA/BS From	**Syracuse University**
Date of BA/BS	**June 2018**
JD/LLB From	**Duke University School of Law** **https://law.duke.edu/career/**
Date of JD/LLB	**May 5, 2023**
Class Rank	**School does not rank**
Does the law school have a Law Review/ Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**

Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

Hunter Dickerson
2530 Erwin Rd., Apt. 224
Durham, NC 27705

June 13, 2023

The Honorable Jamar K. Walker
United States District Court
600 Granby Street
Norfolk, Virginia 23510

Dear Judge Walker,

I am writing to apply for a clerkship for the 2024-2025 term. I graduated from Duke Law in May of 2023. I will be working at a law firm in Los Angeles until the 2024 term. It would be an honor to clerk for you.

Both as a law student and as an undergraduate student, I have worked to develop my writing and researching skills. At Syracuse University, I wrote several research papers that won department-wide and university-wide awards. As a law student. I worked as a research assistant for three professors and co-wrote an article on legal history for Professor Dan Bowling that he plans to publish. My independent study and Duke's Advanced Legal Research course have also enhanced my research skills. I plan to improve my writing skills this summer by reading several legal writing books.

I have worked in fast-paced and demanding environments, including as a Summer Associate at Bush Gottlieb. In this position, I was part of a live negotiation team with a partner and several associates. We worked collaboratively to integrate our analysis of the economic statements and legal issues into an argument for the client. Through this experience, I gained experience working with a small group of people on a time sensitive legal matter.

Enclosed is my resume, Duke Law transcript, writing sample, and letters of recommendation from Professor Anne Gordon, Ms. Lisa Demidovich, and Professor Dan Bowling. Please contact me if you need any additional information. Thank you for your consideration.

Sincerely,

Hunter Dickerson

HUNTER DICKERSON
2530 Erwin Road, Apt. 224, Durham, NC 27705 | hunter.dickerson@duke.edu | (702) 596-6370

EDUCATION

Duke University School of Law, Durham, NC
Juris Doctor expected, May 2023
GPA: 3.51
Activities: American Constitution Society, National Lawyers Guild, Healthcare Planning Project, Duke Graduate Student Union Law School Solidarity Committee, Fair Chance Project, Movement Lawyering Lab

Syracuse University, Syracuse, NY
Bachelor of Science in Political Science and Communications, *summa cum laude*, June 2018
GPA: 3.9
Awards: May Earle Prize for Outstanding Research Project (2018), Best Political Science Paper Award (2018), Best Academic Paper at SU London (2017), Best Sociology Paper Award (2017), White Denison Speech Competition Finalist (2016)
Internships: U.S. House of Representatives

LAW SCHOOL EXPERIENCE

Bush Gottlieb, Glendale, CA
Summer Associate, May 2022 – August 2022
Drafted positions statements and motions, prepared memos on a variety of legal issues, and attended arbitrations, negotiations, and hearings. Analyzed the ability of a hospital to afford a union contract.

Duke Law Health Justice Clinic, Durham, NC
Certified Law Student, January 2022 – April 2022
Drafted and executed estate planning documents for low income clients. Won a disability benefits case Petitioned for standby guardianship and conducted the hearing where the petition was granted.

American Federation of Teachers, Washington, D.C.
Research and Strategic Initiatives Intern, January 2022 – March 2022
Compiled and summarized AFT resolutions by issue area; researched lawsuits against public pension funds and detailed the allegations; communicated with members about union benefits and concerns.

Professors Daniel Bowling, Anne Gordon, and Michele Okoh, Durham, NC
Research Assistant, May 2021 – August 2021
Reviewed extensive legal scholarship, drafted literature reviews and annotated bibliographies, and formed arguments about the history of race and unions, environmental justice, and de-biasing law school clinics.

PRIOR EXPERIENCE

The Law Office of Roger A. Giuliani, Las Vegas, NV
Paralegal, August 2019 – March 2020
Managed client intake; drafted family court motions; drafted trusts, wills, and deeds for execution.

Black and LoBello, Las Vegas, NV
Paralegal, December 2018 – July 2019
Researched case law, reviewed discovery, and drafted pleadings for a small corporate and divorce firm.

Clark County District Attorney's Office, Las Vegas, NV
Legal Intern and Witness Advocate, March 2018 – August 2018
Prepared subpoenas, drafted discovery requests, and supported witnesses and victims during trial.

ADDITIONAL INFORMATION

Won best attorney at the National Mock Trial competition in high school. Won 'outstanding moot court attorney' at national high school competition. Graduated college in three years while working as a barista.

Hunter Dickerson

2530 Erwin Rd Apt. 224
Durham, NC 27705

(702) 596-6370
hunter.dickerson@duke.edu

6052 Cliff View Court
Las Vegas, Nevada 89135

UNOFFICIAL TRANSCRIPT
DUKE UNIVERSITY SCHOOL OF LAW

2020 FALL TERM

COURSE TITLE	PROFESSOR	GRADE	CREDITS
Civil Procedure	Sachs, S.	3.1	4.50
Contracts	Richman, B.	3.2	4.50
Torts	Coleman, D.	3.7	4.50
Legal Analysis, Research, Writing	Ragazzo, J.	*Credit Only*	0.00
Professional Development	Multiple	*Credit Only*	1.00

2021 SPRING TERM

COURSE TITLE	PROFESSOR	GRADE	CREDITS
Constitutional Law	Young, E.	3.2	4.50
Criminal Law	Farahany, N.	3.1	4.50
International Law	Helfer, L.	3.3	3.00
Legal Analysis, Research, Writing	Ragazzo, J.	3.2	4.00

2021 FALL TERM

COURSE TITLE	PROFESSOR	GRADE	CREDITS
Property	Richman, B.	3.2	4.00
Adv Con Law: Civil Rights Mvmt	Lovelace, T.	3.5	3.00
Labor Relations Law	Bowling, D.	3.9	3.00
Ethics and the Law of Lawyering	Richardson, A.	3.4	2.00
Law and Governance in China	Qiao, S.	3.9	2.00

2022 SPRING TERM

COURSE TITLE	PROFESSOR	GRADE	CREDITS
Administrative Law	Benjamin, S.	3.5	3.00
Employment Discrimination	Jones, T.	3.9	3.00

Survey of Immigration Law	Evans, K.	3.8	3.00
Health Justice Clinic	Rice, A.	3.6	5.00
Practitioner's Guide to Labor Law	Bowling, D.	4.0	1.00

2022 FALL TERM

COURSE TITLE	PROFESSOR	GRADE	CREDITS
Evidence	Beskind, D.	3.4	4.00
First Amendment	Benjamin, S.	3.8	3.00
Poverty Law	Greene, S.	3.8	3.00
Alternative Dispute Resolution	Thompson, C.	3.6	2.00
Independent Study: Labor History	Bowling, D.	4.3	2.00

2023 SPRING TERM

COURSE TITLE	PROFESSOR	GRADE	CREDITS
Antitrust	Richman, B.	3.8	4.00
Business Associations	de Fontenay, E.	3.3	4.00
Ad Hoc Tutorial	Gray, K.	Credit	1.00
Movement Lawyering Lab	Gordon, A.	4.0	3.00
Advanced Legal Research	Zhang, A.	3.2	2.00

TOTAL CREDITS: 87.5
CUMULATIVE GPA: 3.51

BUSH GOTTLIEB

801 North Brand Boulevard, Suite 950
Glendale, California 91203
Telephone (818) 973-3200
Facsimile (818) 973-3201
www.bushgottlieb.com

April 28, 2023

99900-3220

Direct Dial: (818) 973-3220
ldemidovich@bushgottlieb.com

Re: Hunter Dickerson's Clerkship Reference

To Whom it May Concern:

I am writing to highly recommend Hunter Dickerson for a clerkship position. Hunter was a summer associate with our firm last summer, where he worked on a variety of assignments for public and private sector unions with matters in state and federal court, before administrative agencies, and being arbitrated before neutral labor arbitrators. Hunter worked on assignments in the firm's traditional labor, ERISA, and bankruptcy practice areas.

Hunter came to work every day with a great attitude, eager to take on whatever assignment was brought his way. Hunter is very smart and was accurate, thorough, and efficient with his time on all assignments. Our summer program is designed to be an accurate representation of what it is like to be an associate at Bush Gottlieb so we provide summer associates with real assignments, take them to client meetings and hearings, and invite them to all attorney meetings and gatherings. Because of this integration, we become well acquainted with our summer associates over the 10-week program. Hunter is a very affable person, and he worked well with everyone from partners to support staff and including his fellow summer associates. He also interacted well with clients, and appreciated the opportunity to meet with them even if the meeting occurred after regular business hours. Hunter will be an excellent addition to any chambers.

Hunter is an avid reader in his free time and intellectually curious. Hunter will do well with the court's challenging docket and wide range of subject areas.

I had the privilege of clerking for the Honorable Kim Wardlaw of the U.S. Court of Appeals for the Ninth Circuit. In my experience, the qualities that make someone successful in a clerkship are a willingness to tackle any assignment given, excellent research and writing skills, and an appreciation that there is a lot to learn from the judge and the more senior attorneys appearing before the court. Hunter possesses and exhibits all of those qualities, and you would be fortunate to have Hunter join your chambers next year.

Please feel free to reach out to me with any questions 818-973-3220.

Very truly yours,

Bush Gottlieb
A Law Corporation

Lisa C. Demidovich

Duke University School of Law
210 Science Drive
Durham, NC 27708

June 15, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Hunter Dickerson

Dear Judge Walker:

I have had Hunter Dickerson in two of my courses, Labor Relations Law and Practitioner's Guide to Labor Law. In those classes he made the highest and second highest grades in the class. I have also supervised writing projects for Hunter and am currently working with Hunter on a labor history article. Quite simply, Hunter is one of the top students I have encountered in my 17 years at Duke Law.

Hunter is an active participant in everything he does. He provided valuable insights to classroom discussion without hogging the spotlight. Hunter has a passion for the law and a curious mind. Maybe as important, he is a positive and optimistic person.

As referenced above, Hunter worked for me as a research assistant in the summer of 2021. Hunter researched and drafted an article on the history of race and the labor movement. I gave Hunter the outline of what I wanted to research and what I wanted to say. Hunter turned in a well-cited 25-page article on the history of race and the labor movement with specific examples, statistics and empirical evidence, quotes, and a broader historical analysis. Hunter's draft of the article was a great starting point for our current research and writing project.

Most recently, I served as the faculty supervisor to Hunter's independent study, where he worked on a paper about labor conflict in early 20th century America. Hunter needs very little instruction because he grasps things quickly. This makes it easy to lay out the vision and goals to Hunter and then trust him to deliver a quality product. For example, I asked Hunter to write a brief history on the Pinkertons for use in a video lecture for a class he has already taken. Two days later, Hunter sent me a paper on the history of the Pinkerton Detective Agency and their role in four major strikes. Reliability and consistency are some of his strongest traits, in addition to his fine intellect.

As a practicing lawyer in addition to a professor for over 40 years I am confident that Hunter will be a great lawyer. I am pleased to provide my personal recommendation. If you have any other questions about Hunter, please feel free to contact me at (850) 377-1400 or bowling@law.duke.edu.

Sincerely yours,

Daniel S. Bowling III
Distinguished Fellow

Duke University School of Law
210 Science Drive
Durham, NC 27708

June 13, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Hunter Dickerson

Dear Judge Walker:

My name is Anne Gordon and I am a Clinical Professor of Law at Duke Law School. I would like to strongly recommend my student, Hunter Dickerson, for a clerkship. Hunter and I have worked together since his 1L year, and I know him well enough to confidently say he would be a great addition to any judge's chambers – he is thoughtful, professional, easy to get along with, and a hard worker.

Hunter came to law school with the goal of pursuing labor work, and many of his courses have been geared toward pursuing that goal. He hopes to pursue a clerkship not only to get more exposure to this area of law, but to get an in-depth look at the federal administrative state and the many ways that other areas of law intersect with labor issues.

I first met Hunter when I hired him as a research assistant after his 1L year. Hunter was organized, self-directed, and thorough, always happy to do extra work to make his research more useful to me. He was always responsive to feedback, and patient when the work took unforeseen twists and turns. It is easy to picture him in a judge's chambers, working with co-clerks and going the extra mile to ensure that his judge was organized and well-informed.

Hunter then took my Movement Lawyering Lab class in the Spring of 2023, and he was a standout student, earning a 4.0. Hunter was not the loudest, or the most talkative student, but his comments were always thoughtful – he made a useful contribution to class whenever he spoke. His knowledge of history and philosophy in addition to modern jurisprudence made him my go-to for a "big picture" view of the topics discussed. He was also a creative thinker and strategist, always thinking of different ways to meet our partners' goals.

A good clerk must be confident in their research but willing to listen to others' viewpoints; they must know the law but be willing to think creatively. A good clerk must also have an even-tempered personality and be easy to work with. Hunter has all of these qualities, and more. I highly recommend him for a clerkship and would be happy to answer additional questions.

Sincerely yours,

Anne D. Gordon
Clinical Professor of Law
Director of Externships

Hunter Dickerson
2530 Erwin Road
Durham, NC 27705
(702) 596-6370
hunter.dickerson@duke.edu

Writing Sample

This is an unedited position statement I wrote as a summer associate at Bush Gottlieb. I have replaced the names of the charging party and the respondent with Charing Party and Respondent. I also removed my employer's information from the document. I have been given express permission to use it as a writing sample.

The position statement responds to a grievance filed by a union member. Respondent is a public sector union in California. Grievances against a public sector union are filed with the Public Employment Relations Board. The citation format of the position statement is in accordance with PERB's rules.

VIA E-FILING

Diana Suarez
Regional Attorney
Public Employment Relations Board
Los Angeles Regional Office
425 W Broadway, Suite 400
Glendale, CA 91204

Re: ***Charging Party v. Respondent,*** **Case No. LA-XX-XXXX-X**
Respondent's Position Statement

Dear Ms. Suarez:

Respondent submits this position statement urging dismissal of the above-referenced charge, which was filed by Charging Party on May 20, 2022. Charging Party appears to allege that Respondent breached its duty of fair representation ("DFR") under section 3544.9 of the Educational Employment Relations Act ("EERA"), and thereby violated section 3543.6(b). As explained below, PERB should dismiss the charge with prejudice for three reasons. First, PERB lacks jurisdiction over the charge's alleged conduct, which concerns a purely internal union dispute. Second, even if PERB is able to assert jurisdiction, the charge fails to state a *prima facie* case of a DFR breach by the Union because it does not allege any conduct rising to the level of being arbitrary, discriminatory, or in bad faith. Third, the charge does not allege facts establishing that the charge was timely filed.

I. The Challenged Conduct is Outside PERB's Jurisdiction

The scope of PERB's jurisdiction is limited to the interpretation and enforcement of collective bargaining legislation relevant to California public-sector employment. GOV'T CODE § 3541.3. PERB can only resolve claims of unfair practices, which are defined as conduct violating the collective bargaining statutes enforced by PERB. (*Los Angeles Unified School District* (1984) PERB Decision No. 448, dismissal ltr., p. 2.) PERB lacks jurisdiction to police internal union affairs. (*California State Employees Association* (1999) PERB Decision No. 1369-S, p. 3 [dismissing allegations that the union conducted elections outside the timeframe required by union bylaws because internal union affairs fall outside PERB jurisdiction]; *California State Employees Association* (1998) PERB Decision No. 1304-S, pp. 2-6 [noting that PERB has traditionally refrained from reviewing the internal affairs of unions].) As PERB declared in *California State Employees Association* (1999) PERB Decision No. 1368-S, at p. 28, "PERB's function is to interpret and administer the statutes which govern the employer-employee relationship, not to police internal relationships among various factions within employee organizations. . . . Internal union disputes are more appropriately presented in a different forum."

To bring internal union affairs within PERB's jurisdiction, a charging party must show that the internal union activities had a substantial impact on charging party's relationship with her employer. (*Service Employees International Union, Local 99 (Kimmett)* (1979) PERB Decision No. 106, p. 10.) PERB has stated, with respect to the duty of fair representation under EERA, that the statute "contains no language indicating that the Legislature intended that section to apply to internal union activities that do not have a substantial impact on the relationships of unit members to their employers." (*Id.*) If the charge does not allege the requisite impact on the employer-employee relationship, then the charging party fails to meet their threshold burden. (*California State Employees Association* (2000) PERB Decision No. 1411-S, p. 23.) The only situations where PERB will intervene in internal union affairs absent a substantial impact on the employer-employee relationship are when a union is alleged to have failed to establish or follow reasonable membership restrictions or disciplinary procedures impacting membership. (*San Jose/Evergreen Federation of Teachers* (2020) PERB Decision No. 2744, p. 18 n.8; *California School Employees Association and its Shasta College Chapter 381* (1983) PERB Decision No. 280, p. 11.) The Charge does not concern either situation.

Here, the Charge alleges conduct that is a part of Respondent's purely internal affairs. Internal union meetings about which school board candidate a union supports and how to organize support for that candidate are outside the scope of PERB's jurisdiction. While Charging Party gives a conclusory allegation, without any factual specificity, that a Respondent officer "tried to coerce and intimidate" her into voting for a certain candidate and did not adequately represent members "by being condescending," the Charge does not meet PERB's precedent for when it will intervene into internal union affairs. (*See California State Employees Association* (1998) PERB Decision No. 1304-S [holding that allegations of abuse and coercion of members did not involve conduct impacting the employment relationship and therefore dismissed the charges].) Furthermore, the Charging Party has not alleged any facts establishing that the officer's alleged conduct had any impact on the employer-employee relationship, nor does she allege that she was subjected to any internal union discipline. Nothing in the narrative of her charge suggests that the employer was involved in any way. Thus, the alleged conduct was entirely an internal union affair and Charging Party has not met her burden of showing an impact on the employer-employee relationship. Therefore, the Charge allegations fall outside PERB's jurisdiction and should be dismissed.

II. The Charge Fails to State a *Prima Facie* Case

A second, independent basis for dismissing the Charge is that it fails to state a *prima facie* case of a DFR breach. PERB Regulation 32615(a)(5) requires that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." The charging party faces the burden of alleging with specificity the particular facts giving rise to

a violation. (*City of Roseville* (2016) PERB Decision No. 22505-M, pp. 12-13.) The charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (*State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S, warning ltr., p. 2 [citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944].) Mere legal conclusions are not sufficient to state a prima facie case. (*Id.*). A Board agent should issue a complaint only when it can be determined that "the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations." (*Eastside Union School District* (1984) PERB Decision No. 466, p. 6.)

In order to state a *prima facie* DFR violation, Charging Party must show that the conduct of an exclusive representative was arbitrary, discriminatory, or in bad faith. (*Rocklin Teachers Professional Association (Romero)* (1980) PERB Decision No. 124, pp. 6-8.) PERB has stated that it is the charging party's burden to show how a union violated its duty of fair representation; it is not the union's burden to show that it properly exercised its discretion. (*United Teachers - Los Angeles (Wyler)* (1993) PERB Decision No. 970, warning ltr., pp. 4-5.) That burden requires the Charging Party to, "at a minimum include an assertion of sufficient facts from which it becomes apparent how or in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment." (*United Teachers of Los Angeles (Strygin)* (2010) PERB Decision No. 2149, warning ltr., p. 4 [quoting *Reed District Teachers Association, CTA/NEA* (1983) PERB Decision No. 332, p. 9].) A DFR breach will not be found where the exclusive representative is guilty of "mere negligence or poor judgment." (*Service Employees International Union (Scates) (Pitts)* (1983) PERB Decision No. 341, Order, pp. 910.) An exclusive representative is not expected, nor required, to satisfy all members of the unit it represents. (*California School Employees Association (Chacon)* (1995) PERB Decision No. 1108, warning ltr., p. 3.)

Here, Charging Party fails to meet its burden of establishing a *prima facie* case of a breach of Respondent's DFR. The Charge statement includes conclusions, rather than descriptive facts, about the alleged conduct. The Charge does not state when and where the incident took place, what the meeting was for, who was invited to the meeting, what is meant by "coerce and intimidate" or how it was effectuated, or who was asked to leave the meeting and why. It also does not include a statement of the remedy sought. Nowhere is there a link to Charging Party's employment relationship, or a remedy related to her employment. Charging Party states conclusions of law, but does not allege sufficient facts to support those conclusions. Further, the limited statement that is given does not indicate a DFR violation. While it seems that Charging Party was insulted by the disagreement she had at the meeting, this does not violate the DFR. The allegations do not explain how the union acted arbitrarily, discriminatorily, or in bad faith.

Thus, the Charging Party has not satisfied her burden to establish a *prima facie* DFR violation, and the Charge should be dismissed for this reason as well.

III. The Charge Does Not Allege Sufficient Facts to Determine Timeliness

It is the Charging Party's burden to show that her charge is timely. In order for a complaint to issue, the charging party must allege facts proving that the unfair practice charge was filed within the statute of limitations period. (*Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board* (2005) 35 Cal.4th 1072, 1086-91; *Los Angeles Unified School District* (2007) PERB Decision No. 1929, p. 6; *City of Santa Barbara* (2004) PERB Decision No.1628-M, warning ltr., p. 2.) Both EERA itself and PERB Regulation 32615(a) require the charging party to allege the date that the unfair practice occurred. (*San Francisco Unified School District* (1985) PERB Decision No. 501, pp. 5-6; *see also Long Beach Council of Employees* (2009) PERB Decision No. 2002, pp. 6-7, 10-11.)

Here, the Charging Party does not meet her burden. There is no reference in the Charge to when the alleged unfair practice occurred. Without these allegations, the Board cannot determine whether the charge is timely and, therefore cannot issue a complaint.[1]

Conclusion

As the foregoing discussion shows, the Charge is subject to dismissal because (1) the allegations concern a purely internal union dispute over which PERB lacks jurisdiction; (2) the allegations do not state a *prima facie* case of a DFR breach; and (3) the allegations do not establish that the charge was timely filed. Additionally, because Respondent's conduct alleged in the charge was not of a kind to give rise to a DFR breach, any opportunity to amend of the Charge would be futile as it would remain outside of PERB's jurisdiction, and the charge should be dismissed with prejudice.

Verification

This response is true and complete to the best my knowledge and belief and is signed under penalty of perjury.

Respectfully,

[1] Even if Charging Party could amend her charge to allege facts establishing timeliness, amendment should not be allowed, because the charge clearly focuses on an internal union dispute over which PERB has no jurisdiction, and on union conduct which does not meet the standard to violate the duty of fair representation.

821216v2

Applicant Details

First Name	**Christopher**
Last Name	**Dietz**
Citizenship Status	**U. S. Citizen**
Email Address	**cdietz@jd24.law.harvard.edu**
Address	**Address** Street **4 Oak Terrace, Apt. 401** City **Somerville** State/Territory **Massachusetts** Zip **02143** Country **United States**
Contact Phone Number	**4153128821**

Applicant Education

BA/BS From	**Vassar College**
Date of BA/BS	**May 2017**
JD/LLB From	**Harvard Law School** **https://hls.harvard.edu/dept/ocs/**
Date of JD/LLB	**May 23, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Harvard Civil Rights–Civil Liberties Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Natapoff, Alexandra
anatapoff@law.harvard.edu
Crespo, Andrew
acrespo@law.harvard.edu
617-495-3168
Barksdale, Russell
barksdalerussell77@gmail.com
(504) 908-2415

This applicant has certified that all data entered in this profile and any application documents are true and correct.

CHRISTOPHER DIETZ

4 Oak Terrace #401, Somerville, MA 02143 | 415.312.8821 | cdietz@jd24.law.harvard.edu

June 12, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I am writing to express my strong interest in a clerkship in your chambers starting in 2024 or 2025. I am a rising third-year student at Harvard Law School who is dedicated to a public interest career as an appellate criminal defense attorney. I am particularly interested in clerking in your chambers because it presents the opportunity to be close to my partner and her family, who live in the DMV area.

Attached please find my resume, law school transcript, and writing sample. The following people are submitting letters of recommendation separately and welcome inquiries in the meantime:

- Prof. Andrew Crespo, Harvard Law School, acrespo@law.harvard.edu, (617) 495-3168
- Prof. Alexandra Natapoff, Harvard Law School, anatapoff@law.harvard.edu, (617) 998-0845
- Russell Barksdale, Louisiana Capital Assistance Center, barksdalerussell77@gmail.com, (504) 908-2415

I would bring strong legal research skills and extensive writing experience with me to a clerkship. As a summer intern for the Louisiana Capital Assistance Center, I helped to prepare interlocutory appeals to Louisiana's appellate and supreme courts. In my 2L year, I interned for the Appeals Unit of the Massachusetts state public defender. My assignments included a 50-state survey of firearm statutes from the colonial period to the 19th century, an in-depth comparison of a federal statute with its state counterpart through Supreme Court, federal, and state precedents, and the application of the *Padilla* doctrine to a novel ineffective assistance of counsel claim. I subsequently completed a research paper on this third topic under the supervision of Professor Natapoff. Also in my 2L year, I was a clinical student at the Institute to End Mass Incarceration under Professors Crespo and Dharia, where I researched administrative law topics such as the law of congressional appropriations and litigation under federal compliance statutes. Additionally, over the past two years, as a Technical Editor and Subciter for the *Harvard Civil Rights – Civil Liberties Law Review*, I have been responsible for editing hundreds of pages of text.

I would be honored to contribute to the important work of your chambers. Thank you very much for your time and consideration.

Sincerely,

Christopher Dietz

Enclosures: Resume, Harvard Law School Transcript, Writing Sample.

CHRISTOPHER DIETZ

4 Oak Terrace #401, Somerville, MA 02143 | 415.312.8821 | cdietz@jd24.law.harvard.edu

EDUCATION

Harvard Law School, J.D. Candidate, May 2024
Activities: *Harvard Civil Rights – Civil Liberties Law Review*, Technical Editor
Professor Daniel Medwed, Research Assistant (Incoming 2023-2024)
Harvard Defenders, Student Attorney
Harvard Prison Legal Assistance Project, Student Attorney
Trial Advocacy Workshop (Winter 2023, Professor Ron Sullivan)
Criminal Justice Clinic (Incoming 2023-2024, Professor Dehlia Umunna)

Vassar College, B.A. in Political Science, May 2017
Activities: Vassar Prison Initiative
Professor Luke Harris, Research Assistant (American Politics, Critical Race Theory)
Thesis: *The Indigent and the Dangerous: Against the Legitimation of Preventive Detention in Contemporary Bail Reform* (Ida Frank Guttman Prize for Best Political Science Thesis)

EXPERIENCE

Brooklyn Defender Services | *Law Clerk, Criminal Defense Practice* | Brooklyn, NY Summer 2023
Assist trial attorneys in representation of clients in Brooklyn Criminal and Supreme Courts.

Institute to End Mass Incarceration | *Clinical Student* | Cambridge, MA Spring 2023
Assisted Professors Andrew Crespo and Premal Dharia in researching mechanics and litigation related to the congressional appropriations process (rescission, impoundment, transfer and reprogramming) and statutes governing federal projects (e.g. NEPA, Clean Water Act) in order to support efforts to block the construction of a federal prison.

Committee for Public Counsel Services | *Law Clerk, Appeals Unit* | Boston, MA Fall 2022
Completed legal research and writing assignments for Appeals Unit attorneys in felony and misdemeanor cases. Research topics included: penalties in firearm statutes from the colonial period to late 19th century; application of collateral consequence IAC doctrine to civil commitment; and comparison of the federal and Massachusetts ACCA. Participated in moots in preparation for oral arguments in the Massachusetts Supreme Judicial Court and Appeals Court.

Louisiana Capital Assistance Center | *Law Clerk* | New Orleans, LA Summer 2022
Supported trial-level representation of 5 clients facing the death penalty in Louisiana. Conducted legal research, including an in-depth memo on circumstances that render search warrants deficient. Drafted and edited pretrial motions, including motions to bar evidence and argument of future dangerousness, motions to exclude gruesome photos, and motions for missing discovery. Drafted and edited extraordinary writ petitions to the Louisiana Circuit Court of Appeals and Louisiana Supreme Court.

Innocence Project | *Paralegal, Post-Conviction Litigation* | New York, NY 2018 – 2021
Supported attorneys in post-conviction DNA litigation for an ongoing docket of 41-57 clients covering 14 states. Drafted letters in support of clients' parole and clemency. Wrote memoranda on discrete factual issues, including: discrepancies between police accounts of arrest/shooting and client testimony; chain of custody; and forensic testing results. Created digests of trial transcripts. Drafted record and evidence search requests. Coordinated evidence transmission with forensics labs.

Sanford Heisler Sharp, LLP | *Legal Assistant* | New York, NY 2017 – 2018
Supported attorneys in employment discrimination, wage theft, and whistleblower cases. Served as the lead legal assistant on a gender discrimination case against a Big Law firm as well as a pre-suit, multi-client gender discrimination case against a large bank. Assisted in the settlement of two major class action lawsuits for $2.5 and $4 million.

San Francisco Public Defender's Office | *Undergraduate Intern, Bail Unit* | San Francisco, CA Summers 2015 & 2016
Drafted 2-3 bail motions per week. Interviewed clients in county jails to craft statements for motions. Communicated with clients' family, friends, and service providers to supplement bail motions with additional information, coordinate attendance of clients' hearings, and ensure access to continued support upon clients' release.

ADDITIONAL SKILLS AND EXPERIENCE

Spanish (proficient). Working knowledge of various forensic techniques, including DNA testing.

Harvard Law School

Date of Issue: June 8, 2023
Not valid unless signed and sealed
Page 1 / 2

Record of: Christopher Kalimos Dietz
Current Program Status: JD Candidate
Pro Bono Requirement Complete

JD Program

Fall 2021 Term: September 01 - December 03

1000	Civil Procedure 1 Rubenstein, William	P	4
1001	Contracts 1 Okediji, Ruth	P	4
1006	First Year Legal Research and Writing 1A Francis, Daniel	H	2
1003	Legislation and Regulation 1 Tarullo, Daniel	P	4
1004	Property 1 Mann, Bruce	H	4

Fall 2021 Total Credits: 18

Winter 2022 Term: January 04 - January 21

1052	Lawyering for Justice in the United States Gregory, Michael	CR	2

Winter 2022 Total Credits: 2

Spring 2022 Term: February 01 - May 13

2011	Art of Social Change Gregory, Michael	H	2
1024	Constitutional Law 1 Eidelson, Benjamin	P	4
1002	Criminal Law 1 Yang, Crystal	H	4
1006	First Year Legal Research and Writing 1A Francis, Daniel	H	2
1005	Torts 1 Gersen, Jacob * Dean's Scholar Prize	H*	4

Spring 2022 Total Credits: 16
Total 2021-2022 Credits: 36

Fall 2022 Term: September 01 - December 31

2050	Criminal Procedure: Investigations Crespo, Andrew	H	4
8099	Independent Clinical - Committee for Public Counsel Services, Appeals Unit Natapoff, Alexandra	CR	3
2142	Labor Law Sachs, Benjamin	H	4
2761	Misdemeanor Justice Natapoff, Alexandra	CR	1

Fall 2022 Total Credits: 12

Winter 2023 Term: January 01 - January 31

2249	Trial Advocacy Workshop Sullivan, Ronald	CR	3

Winter 2023 Total Credits: 3

Spring 2023 Term: February 01 - May 31

2079	Evidence Clary, Richard	P	3
8051	Institute to End Mass Incarceration Clinic Crespo, Andrew	H	4
3003	Institute to End Mass Incarceration Clinical Seminar Crespo, Andrew	H	2
2165	Legal History: Continental Legal History Donahue, Charles	P	3

Spring 2023 Total Credits: 12
Total 2022-2023 Credits: 27

Fall 2023 Term: August 30 - December 15

2086	Federal Courts and the Federal System Goldsmith, Jack	~	5
3119	Poverty Law Workshop: Leveraging the Safety Net to Address Homelessness & Advance Equity McCormack, Julie	~	2

Fall 2023 Total Credits: 7

Fall 2023 - Winter 2024 Term: August 30 - January 19

8002	Criminal Justice Institute: Criminal Defense Clinic Umunna, Dehlia	~	5
2261	Criminal Justice Institute: Defense Theory and Practice Umunna, Dehlia	~	4

Fall 2023 - Winter 2024 Total Credits: 9

Spring 2024 Term: January 22 - May 10

2000	Administrative Law Block, Sharon	~	4

continued on next page

Harvard Law School

Record of: Christopher Kalimos Dietz

Date of Issue: June 8, 2023
Not valid unless signed and sealed

2169	Legal Profession: Understanding the Plaintiff's Attorney Rubenstein, William	~	3
		Spring 2024 Total Credits:	7
		Total 2023-2024 Credits:	23
		Total JD Program Credits:	86

End of official record

HARVARD LAW SCHOOL
Office of the Registrar
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A student is in good academic standing unless otherwise indicated.

Accreditation

Harvard Law School is accredited by the American Bar Association and has been accredited continuously since 1923.

Degrees Offered

J.D. (Juris Doctor)
LL.M. (Master of Laws)
S.J.D. (Doctor of Juridical Science)

Current Grading System

Fall 2008 – Present: Honors (H), Pass (P), Low Pass (LP), Fail (F), Withdrawn (WD), Credit (CR), Extension (EXT)

All reading groups and independent clinicals, and a few specially approved courses, are graded on a Credit/Fail basis. All work done at foreign institutions as part of the Law School's study abroad programs is reflected on the transcript on a Credit/Fail basis. Courses taken through cross-registration with other Harvard schools, MIT, or Tufts Fletcher School of Law and Diplomacy are graded using the grade scale of the visited school.

Dean's Scholar Prize (*): Awarded for extraordinary work to the top students in classes with law student enrollment of seven or more.

Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
May 2011 - Present

Summa cum laude	To a student who achieves a prescribed average as described in the Handbook of Academic Policies or to the top student in the class
Magna cum laude	Next 10% of the total class following *summa* recipient(s)
Cum laude	Next 30% of the total class following *summa* and *magna* recipients

All graduates who are tied at the margin of a required percentage for honors will be deemed to have achieved the required percentage. Those who graduate in November or March will be granted honors to the extent that students with the same averages received honors the previous May.

Prior Grading Systems
Prior to 1969: 80 and above (A+), 77-79 (A), 74-76 (A-), 71-73 (B+), 68-70 (B), 65-67(B-), 60-64 (C), 55-59 (D), below 55 (F)

1969 to Spring 2009: A+ (8), A (7), A- (6), B+ (5), B (4), B- (3), C (2), D (1), F (0) and P (Pass) in Pass/Fail classes

Prior Ranking System and Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
Prior to 1961, Harvard Law School ranked its students on the basis of their respective averages. From 1961 through 1967, ranking was given only to those students who attained an average of 72 or better for honors purposes. Since 1967, Harvard Law School does not rank students.

1969 to June 1998	General Average
Summa cum laude	7.20 and above
Magna cum laude	5.80 to 7.199
Cum laude	4.85 to 5.799

June 1999 to May 2010
Summa cum laude General Average of 7.20 and above (exception: *summa cum laude* for Class of 2010 awarded to top 1% of class)
Magna cum laude Next 10% of the total class following *summa* recipients
Cum laude Next 30% of the total class following *summa* and *magna* recipients

Prior Degrees and Certificates
LL.B. (Bachelor of Laws) awarded prior to 1969.
The I.T.P. Certificate (not a degree) was awarded for successful completion of the one-year International Tax Program (discontinued in 2004).

June 07, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

It is a pleasure to write this letter of recommendation for Christopher Dietz. Chris was a student in my small reading group this year, and I also supervised his clinical externship research paper, so I have had the opportunity to get to know his work quite well. Chris is a strong and careful writer, an engaged thinker, and deeply committed to public service. Not only does he work very hard, he knows how to learn and grow from his experiences. He will make an excellent clerk.

In Fall 2022, Chris was a student in my reading group titled “Misdemeanor Justice.” The class was small, only thirteen students, and involved intensive reading assignments regarding all aspects of the criminal misdemeanor system, followed by in-class discussion of the material. Chris was a central participant in this tightknit group: always prepared, thoughtful, and in conversation with other members of the class. His deep interest in the subject matter shone through every time, and I could always count on him to advance the discussion in a nuanced way.

This class was pass-fail but if it had been graded, Chris would have received a top grade. This is consistent with the rest of his transcript which demonstrates his generally strong mastery from the outset of law school, and increasing proficiency over time. I would expect Chris to do very well in his third year.

That same fall, I also supervised Chris in his clinical externship at the Committee for Public Counsel Services (CPCS) Appeals Unit where he wrote a substantial research paper. Students have a choice for their writing requirement when they do a clinical externship, and Chris chose the more onerous option of writing a substantive research paper titled “Incarceration Without Notice: Arguing for the Extension of Padilla to the Civil Commitment Context.” He was inspired by the experiences of one of his appellate clients who was not advised by his attorney that he could be involuntarily committed and lose his right to carry a firearm pursuant to a civil commitment hearing. Chris argued in his paper that such consequences of involuntary commitment should be treated like deportation under Padilla v. Kentucky, and that failure to advise should therefore be deemed ineffective assistance of counsel.

The issue was a complicated one. It required Chris to master the details both of Massachusetts law, which distinguishes between direct and collateral consequences, and extensive post-Padilla Sixth Amendment case law. He needed to master quite a bit of doctrine that he had not formally studied, and figure out how to organize and present it clearly. He also needed to delve into the law review literature to see how scholars had handled similar issues.

As a 2L, Chris did not have extensive experience writing law school research papers, so he needed to learn this new skill. We spent quite a bit of time discussing not only the substantive issues but how he might think in a more scholarly and discursive way about the dilemmas presented by his client’s case.

Chris learned quickly and his drafts improved dramatically. He figured out how to move nicely between larger theoretical arguments and more concrete doctrinal applications. His work over the semester reflected steady progress and increased depth. The ultimate product was clear, thoughtful, rigorous, and interesting—quite a feat for a second-year student in the middle of a challenging clinical externship. Overall I was impressed with Chris’s engagement with and execution of an ambitious project.

Over the course of the semester I had the chance to talk to Chris quite a bit about his plans and aspirations. He is deeply committed to public service and, as you can see from his résumé, he has worked hard to build out his experiences in the public defense space. He seems to get real satisfaction from representing his clients with zeal, and from the opportunities that lie before him to do more such work. My impression is that he is sincere and idealistic even as he is realistic about the challenges of working in public defense.

Finally, Chris has an easygoing and slightly low key demeanor. He is intellectually serious and rigorous, but unlike some of his classmates he does not insist on demonstrating his strengths in public or at the expense of others. Rather, his strengths show up in his work ethic and his work product. This made him a pleasure to have in class and will make him a positive member of any chambers that he clerks in.

In sum, Chris is a strong student, a clear and careful writer, a committed member of the legal community, and well on his way to becoming an excellent attorney. I am confident that he will be an excellent clerk.

Please let me know if I can provide any additional information.

Sincerely,

Alexandra Natapoff
Lee S. Kreindler Professor of Law

Alexandra Natapoff - anatapoff@law.harvard.edu

HARVARD LAW SCHOOL

CAMBRIDGE · MASSACHUSETTS · 02138

ANDREW MANUEL CRESPO

Morris Wasserstein Public Interest Professor of Law 617.495.3168
Founder and Executive Faculty Director, Institute to End Mass Incarceration acrespo@law.harvard.edu

June 8, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker,

It is my pleasure to write to you in enthusiastic support of Chris Dietz's application to serve as a law clerk in your chambers. I know Chris exceptionally well, having taught and worked with him in two related but distinct settings over the course of the past academic year: He was a student in my upper-level Criminal Procedure course and was also one of the eight students whom I admitted to the clinic that I direct at Harvard Law School as a component of the Institute to End Mass Incarceration. The first of these settings is a traditional law school academic course, in which Chris showcased his impressive talents as a doctrinal analyst. Based in part on that performance, I admitted him into the clinic, where I gained a unique insight into what it is like to work closely with him on an extended and challenging project in which research and writing skills were at the highest premium. Having gotten to know Chris so well in that special setting, I feel confident predicting that he will be a terrific clerk. I recommend him to you with enthusiasm.

I first came to know Chris when he was a student in my Criminal Procedure Investigations class during his 2L year. The course is one of our school's larger classes, with one hundred and thirty-five upper-level students enrolled, many of whom serve on the *Law Review* and go on to graduate *magna cum laude.* In that impressive setting, Chris stood out as an excellent student. In each of our many interactions in class, he showed himself to be sharp, careful, and thoughtful. His responses to questions demonstrated an attentiveness to all of the essential details of the case. At the same time, he was adept at situating his analysis within a larger doctrinal and historical context—he can see the forest and the trees. Having spent three years as a law clerk myself, I remember how often I would sit down to talk through hard cases with each of my judges and justices, and how essential those conversations were not just in framing the eventual opinion, but in sorting

out how best to approach and decide the case itself. I think Chris will be a real asset to you in those conversations.

Given Chris's strong performance throughout the semester, I was not surprised in the least to see Chris turn in an exam that easily earned Honors marks. And that is par for the course. After an initially mixed first semester (two Hs, three Ps), Chris has had an impressive trajectory, earning an unbroken string of Hs over the following semesters, with a Dean's Scholar Prize from my colleague Professor Gersen (by reputation a demanding grader) as icing on top. Having spent many years as a member of our clerkship committee, I can tell you with confidence that Chris's grades not only capture well his talent but also make him a very competitive applicant. His ability to rebound from his first semester to produce such an impressive string of top marks is a testament as well to his resilience and strength of character.

Based largely on his performance in class, I selected Chris the following semester to be one of only eight students in a clinic that I direct at Harvard Law School as a component of the Institute to End Mass Incarceration. The clinic is designed to immerse students in the design and execution of a high-impact strategic litigation campaign undertaken in coordination with a coalition of organizers. Our role in the coalition is to map out innovative legal strategies that could help to advance the coalition's organizing and campaign goals across various dimensions—from courtroom success, to narrative framing, to mobilizing organizing efforts. The students were required to demonstrate creative and strategic thinking, to work collaboratively on team-based projects, and to throw themselves into a semester-long writing project that included multiple rounds of drafting and intensive revision under the direct supervision of me and my co-instructor, the Institute's Executive Director, Prema Dharia.

We selected the eight enrolled students out of dozens of impressive applicants. Together, we operated as a full-time law office to develop a comprehensive and detailed set of legal strategy memos that offered roadmaps for different ways in which law might be leveraged in service of the coalition's goal of halting construction of a new prison in central Appalachia. The substantive areas of law canvassed by the students were wide-ranging, covering fields such as property law, eminent domain, administrative law, environmental law, and federal appropriations law. The clinic is leanly staffed—just two instructors and the students, with the instructors serving as supervising attorneys and the students serving as the lawyers on the project under our direct supervision. To make room for this project, I clear out all of my other teaching and writing responsibilities for the semester and work with the students full time on our campaign.

As you might imagine, working with students in such an intensive way over the course of a semester gave me a unique insight into their personalities, aptitudes, and strengths.

In fact, as I told the students multiple times, the relationships developed between students and supervisors in our shared work felt very much like the relationships that I had previously developed with the judges and Justices I clerked for during my three years as a law clerk. The time I spent working with Chris in that special setting confirmed my sense that he is already a talented and nuanced legal thinker, and that he will be an excellent clerk. He is diligent, precise, professional, methodical, analytical, creative, and wise.

Beyond all of that, he is also a terrific person. In the clinic, he was a generous and thoughtful team player who became more a colleague than a student by the end of our time together. He carries himself with a quiet confidence, a disarming sense of humor, and is gracious and generous with every member of the team. As for his strength of character, Chris has impressed me with his evident commitment to serving the public interest, and to criminal justice work in particular. That commitment comes through in his words and in his deeds, as he speaks passionately about the ends to which he intends to devote his considerable talents as a lawyer. Already, he has set himself out along that path, in both clinical work and in his time before and during law school working at a string of impressive offices, from the Innocence Project, to the Brooklyn Defender Service, to the Louisiana Capital Assistance Project, to our own public defender here in Boston.

A student with a track record of landing so many impressive positions clearly has something special going for him—and in Chris's case, I can confirm that I've seen it firsthand. It is my pleasure to recommend him to you. I hope you will not hesitate to contact me if you have any questions about his candidacy.

Sincerely,

Andrew Manuel Crespo

June 11, 2023

To Whom It May Concern:

I had the immense pleasure of working with Mr. Chris Dietz during the summer of 2022. Chris is brilliant and assiduous. Many interns fall into the habit of being simple taskmasters. However, Chris was a rare combination: a self-starter who deeply understood the needs of our clients and legal team. During my three years of supervising interns at the Louisiana Capital Assistance Center (LCAC), where I was employed until this month, and seven years at the Orleans Public Defenders, the public defense firm of New Orleans, Chris is likely the all-around best intern I have ever supervised.

LCAC is a non-profit organization that provides representation to indigent capital defendants, principally at the trial level, in Louisiana and other southern states. LCAC also pursues systemic litigation related to issues such as racism in the criminal justice system and lack of funding for adequate representation. Its work is both high volume and high stakes, yet it is limited by resources to a small permanent staff. As a result, LCAC asks and expects a great deal of interns and volunteers. Chris worked as a full-time summer legal intern at the LCAC from May 31 to August 5, 2022. The office benefited tremendously from his work ethic and commitment to our clients.

Chris worked on four different cases while interning at LCAC. Two of them were capital. Two were formerly capital cases where the clients faced very serious charges. The stress of representing clients in such dire predicaments never seemed to phase Chris. He quickly formed relationships with clients. He visited with them often, updated them on their cases, and communicated with them about their needs. His work ranged widely, from helping prepare writs (Louisiana's term for interlocutory appeals) covering complex issues that mixed state and federal law to helping a client get prescription eyeglasses.

Chris consistently went beyond what was asked of him in everyday tasks. For example, when assigned the simple task of changing the headers on a large stack of motions, Chris recognized that the citations were out of date and updated all the relevant cites in the entire stack. He was even able to replace some of the overruled caselaw with cases that could stand for the same proposition.

Chris is a phenomenal researcher and writer. He was consistently successful in finding pertinent cases and is meticulous with his Bluebook citations. Most impressively, although Chris had only finished one year of law school and had not yet taken criminal procedure when he interned with me, he wrote a very thorough and precise memorandum of law for a case that involved over twenty searches and search warrants. The issues ranged from jurisdiction, to standing, to the open-fields doctrine, to the nexus requirement. The broad range of issues and types of searches made creating a memo very difficult. However, Chris was able to find and process relevant cases and sources into a memorandum that greatly assisted me with preparing for oral argument and successive litigation. His final memorandum was over twenty-five pages long, but it was very well organized and easy to wield.

In a different example of Chris's strengths, he assisted me in performing an all-day review in another parish for a capital case where we photographed and catalogued hundreds of items of evidence. Prior to the review, he checked through all the voluminous evidence in order to prepare a list of all the evidence we believed was missing. During the review, he was our point person in highlighting the pieces of evidence we had never seen. After the review, he stayed up late at night, again cataloguing the evidence we still believed we were missing in order to prepare for a motion hearing the next morning.

Chris was also responsive and eager to assist. With less than a day's notice, the day after a federal holiday, he volunteered to assist with the filing of approximately fifty motions that were due that day. He showed up at 5 a.m. at the office that morning to help with the printing in order to ensure the paper motions—in total over a thousand pages of exhibits and service copies—were ready in time. He then drove the motions, by himself, six hours across the state. Once at the courthouse, filing the motions required coordinating with the judge and clerk of court, which he did with class. As always, he never complained.

I enjoyed working with Chris last summer. He required almost no supervision and always stayed on task. I think he can easily merge into any office and do hard work with a smile on his face.

Sincerely,

Russell Barksdale

Russell Barksdale
LCAC Staff Attorney 2019–2023
430 South Saint Patrick Street
New Orleans, LA 70119
Barksdalerussell77@gmail.com
(504) 908-2415

To: Russell Barksdale
From: Chris Dietz
Date: July 27, 2022
RE: Supporting caselaw for claims about deficiency of search warrants

This memo reviews and compiles supporting caselaw to supplement claims from our Motion to Suppress Seized Evidence about the deficiency of 19 search warrants obtained in **[our client's**] case. In our motion, we refer to four prima facie flaws of the challenged warrants: (1) the warrant is far too broad, (2) the warrant lacks a nexus between the crime and the broad material requested, (3) the warrant relies on an application/affidavit with conclusory statements rather than facts that can be evaluated, and (4) the subject of the search warrant is not within the jurisdiction of the court issuing the warrant. Each category of challenge will be discussed after a brief overview of the foundational principles governing search warrants.

A. Foundational Principles Governing Search Warrants

The United States Constitution protects persons from unreasonable search and seizure of their "houses, papers, and effects[.]" U.S. Const. amend. IV. With some exceptions, all searches or seizures must be executed pursuant to a warrant, and that warrant must be issued "upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." U.S. Const. amend. IV. The Louisiana Constitution contains nearly identical language, with the addition that the warrant must describe "the lawful purpose or reason for the search." *See* La. Const. art. 1 § 5. The Louisiana Code of Criminal Procedure similarly provides: "A search warrant may issue only upon probable cause established to the satisfaction of the judge, by the affidavit of a credible person, reciting facts establishing the cause for issuance of the warrant." La. C.Cr.P., art. 162.

The evidence and facts in support of a warrant (either in the warrant application's language or in the affidavit attached by the officer) must lead to two conclusions: (1) probable cause exists to believe the described items and/or area to be searched are connected with the alleged criminal activity (*Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 307 (1967)), and (2) probable cause exists to believe the items sought will be found in the place to be searched (*State v. Mena*, 399 So. 2d 149, 152 (La. 1981)). At a basic level, the magistrate or judicial officer reviewing the warrant "must be supplied with enough information to support an independent judgment that probable cause exists for the issuance of a warrant." *State v. Morstein*, 404 So. 2d 916, 919 (La. 1981) (summarizing a holding of *Whiteley v. Warden*, 401 U.S. 560 (1971)).

In general, courts will not read warrants and the accompanying affidavits in overly exacting ways—"[a]ffidavits supporting the issuance of search warrants must be read in a common sense manner." *State v. Guidry*, 388 So. 2d 797, 800 (La. 1980), citing *United States v. Harris*, 403 U.S. 573 (1971). The Supreme Court has stated:

> [T]he Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.

United States v. Ventresca, 380 U.S. 102, 108 (1965).

In keeping with this permissive attitude, defective descriptions in warrant applications can be saved by adequate description in the affidavit so long as the warrant specifically incorporates the affidavit and the affidavit accompanies the warrant. *Groh v. Ramirez*, 540 U.S.

551 (2004) (holding "obviously deficient" warrant unconstitutional when it failed to incorporate by reference the detailed supporting affidavit/application that would have otherwise made it sufficient). Where a warrant contains general or even misleading descriptions that might subject them to the challenges discussed below, courts may still find that information in the affidavit sufficiently clarifies the warrant. *State v. Smith*, 397 So. 2d 1326, 1328 (La. 1981) (referring to *State v. Hysell*, 364 So. 2d 1300 (La. 1978) and *State v. Cobbs*, 350 So. 2d 168 (La. 1977)).

B. Broadness and Particularity

In our motion, we challenge the warrants as "far too broad," but broadness can refer to two types of challenges. In one sense, a warrant could be too "broad" by being vague, meaning that it is not specific enough to exclude unrelated items and sufficiently direct an officer's attention to the correct area or items sought. In another sense, a warrant can be "broad" when the scope of what is described is beyond what would be necessary or allowed for the purposes of the search, even though the warrant might be clear. This section discusses both senses of the broadness challenge.

Broadness challenges to warrants that are overly vague stem from the "particularity" requirement of the Fourth Amendment, which states that warrants must "particularly [describe] the place to be searched and the persons or things to be seized." U.S. Const. amend. IV. *See also* La. Const. art. 1 § 5. The particularity requirement "ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *Maryland v. Garrison*, 480 U.S. 79, 84 (1987). There are three main policy considerations underlying the particularity requirement as articulated by the U.S. Supreme Court: (1) the prevention of general searches (*Marron v. United States*, 275 U.S. 192 (1927)); (2) the prevention of mistaken/unauthorized searches and seizures (*id.*); and

(3) the prevention of the "issue of warrants on loose, vague, or doubtful bases of fact" (*Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931)). For these reasons, an "indiscriminate sweep" is "constitutionally intolerable." *Stanford v. Texas*, 379 U.S. 476, 486 (1965).

However, similar to the general principle that the reading of a warrant and affidavit must be commonsensical and rehabilitative, if a warrant is ambiguous such that it might fail the particularity requirement, courts may utilize other information in the affidavit to resolve its ambiguity and support issuance of the warrant. *United States v. Haydel*, 649 F.2d 1152, 1157 (5th Cir. 1981); *accord State v. Smith*, 397 So. 2d 1326, 1328 (La. 1981) ("In some instances this Court has found that information contained in the affidavit may serve to 'particularize' an otherwise general or misleading description in the warrant such that the warrant description is sufficient.").

1. Places

Courts have held that a "basic requirement" of the Fourth Amendment is that "the officers who are commanded to search be able from the 'particular' description of the search warrant to identify the specific place for which there is probable cause to believe that a crime is being committed." *United States v. Hinton*, 219 F.2d 324 (7th Cir. 1955); *accord United States v. Laws*, 808 F.2d 92 (D.C. Cir. 1986). Primarily, the description should prevent a search of the wrong place. *See State v. Cobbs*, 350 So. 2d 168, 171 (La. 1977) ("If the place to be searched is described in sufficient detail to enable the officers to locate it with reasonable probability that the police will not search the wrong premises, the description is sufficient."); *State v. Smith*, 397 So. 2d 1326, 1328 (La. 1981) ("The object of the particularity requirement is to prevent the search of the wrong premises.").

In line with the general level of scrutiny established for warrants, perfection is not required when describing a place—it "is enough if the description is such that the officer with a search warrant can, with reasonable effort, ascertain and identify the place intended." *Steele v. United States*, 267 U.S. 498, 503 (1925). For city premises and dwellings, courts have considered a street address sufficient. *United States v. Dancy*, 947 F.2d 1232 (5th Cir. 1991); *accord United States v. Johnson*, 944 F.2d 396 (8th Cir.1991).[1] Even when a street address is not given, descriptive facts have also been held sufficient if they identify the premises. *See, e.g., Tomblin v. State*, 128 Ga.App. 823, 198 S.E.2d 366 (1973) (numbered apartment in "Colonial Terrace Apartments" sufficient when there was only one apartment complex by that name in the city)).

A search warrant for a multiple-occupancy building (such as an apartment, hotel, or house) will likely be held invalid if it does not describe the particular unit to be searched so as to preclude a search of other units. *United States v. Haydel*, 649 F.2d 1152, 1157 (5th Cir. 1981) (the warrant "need only describe the place to be searched with sufficient particularity to direct the searcher, to confine his examination to the place described…."); *see also United States v. Perez*, 484 F.3d 735 (5th Cir. 2007). If the warrant does not manage to describe a single premises, even though it might seem to, the warrant could be invalidated on the basis of being insufficiently particular.[2] Like other aspects of the law governing search warrants, this circumstance might be subject to a reasonableness consideration in the state's favor. If an officer didn't have reason to believe, and couldn't have discovered by reasonable investigation, that the unit referred to in the warrant was actually multiple units, the warrant and accompanying search

[1] For premises in rural areas without traditional or obvious street markings, courts have found that the owner's name and general directions for reaching the premises are sufficient. *See, e..g., United States v. Rogers*, 150 F.3d 851 (8th Cir. 1998); *United States v. Sherrell*, 979 F.2d 1315 (8th Cir. 1992); *Costner v. State*, 318 Ark. 806, 887 S.W.2d 533 (1994).

[2] For example, if the specified premise turns out to be a subunit, warrants have been held not to cover any other subunits, even if the police were unaware they would actually encounter subunits. *See, e.g., State v. Devine*, 307 Or. 341, 768 P.2d 913 (1989).

could be sustained. *See, e.g., Maryland v. Garrison*, 480 U.S. 79 (1987) (holding execution of warrant, and by extension warrant, was reasonable given officers' beliefs that they had entered the 'third floor dwelling' listed in the warrant, though third floor had multiple units, and officers entered unit previously not suspected).

2. Objects

The key concern for the ultimate accuracy of a warrant that animates the governance of searches of premises also governs the seizure of objects. Like searches of premises, warrants for seizures of objects that do not specify the appropriate objects of seizure to the exclusion of other objects will be held deficient. *Groh v. Ramirez*, 540 U.S. 551 (2004) (where warrant did not describe items to be seized "at all," lack of particularity as to items to be seized). The Fifth Circuit has said that the particularity requirement, as applied to seizures of objects, aims to prevent "general exploratory rummaging and seeks to ensure that the executing officer is able to distinguish between those items which are to be seized and those which are not." *United States v. Hill*, 19 F.3d 984, 987 (5th Cir. 1994); *see also Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (stating problem of general warrants is of "general, exploratory rummaging in a person's belongings"); *State v. Hughes*, 433 So. 2d 88, 921–92 (La. 1983) (the particularity requirement "makes general searches... impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.") (quoting *Andresen v. Maryland*, 427 U.S. 463 (1976)).

The level of description required of objects again appears to be permissive—the particularity requirement "requires the search warrant to describe the property to be seized with reasonable specificity, but not with elaborate detail." *Hill*, 19 F.3d. at 987. At the same time, the Louisiana Supreme Court seems to have argued that the flexibility of the particularity

requirement should be set in relation to the level of complexity of investigation. *Cf. State v. Hughes*, 433 So. 2d 88, 92 (La. 1983) ("[The] United States Supreme Court has recognized that effective investigation of complex white-collar crimes may require the assembly of a 'paper puzzle' from a large number of seemingly innocuous pieces of individual evidence: 'The complexity of an illegal scheme may not be used as a shield to avoid detection when the State has demonstrated probable cause to believe that evidence of this crime is in the suspect's possession.'") (quoting *Andresen v. Maryland,* 427 U.S. 463, 481 n. 10 (1976)).

Even if the description of objects is clear, the warrant may still be defective if its scope is broader than can be justified by the probable cause showing. *See, e.g., VonderAhe v. Howland*, 508 F.2d 364 (9th Cir. 1974) (warrant for *all* books and records of person being investigated for tax fraud too broad, because affidavit indicated that records recording concealed income were a *certain* type of record and located in *certain* place in the office). Similarly, a warrant may be defective if the items it names precisely do not cover another kind of item, even though they might be part of the same category. *Cf. United States v. Hill*, 19 F.3d 984 (5th Cir. 1994) (acknowledging this possibility, but holding that "check stubs" described by the warrant were essentially the same in *function* as the seized "cash disbursement journals").

There are at least three circumstances in which property requires more precise description than usual, as articulated by LaFave et al. in their treatise *Criminal Procedure*:[3] (1) the type of property is in lawful use in substantial quantities;[4] (2) objects of the type are likely to be found at the place searched;[5] and (3) the consequences of seizure of innocent articles by mistake will be

[3] 2 Wayne R. LaFave, Jerold H. Israel, Nancy J. King & Orin S. Kerr, *Criminal Procedure* § 3.4(f) Particular description of things to be seized (4th ed. 2021).
[4] *See In re 1969 Plymouth Roadrunner*, 455 S.W.2d 466 (Mo. 1970) (description of "stereo tapes or players" insufficient).
[5] *See State v. Henderson*, 289 Neb. 271, 854 N.W.2d 616 (2014); *People v. Einhorn*, 75 Misc.2d 183, 346 N.Y.S.2d 986 (1973) (warrant to search drug store for "drugs" and "business records" was "indistinguishable from a general

substantial, e.g. books or films,[6] papers of a newsgathering organization,[7] or cell phones.[8] Computers may also fall into this third category.[9] In contrast, more latitude is given for searches for contraband items like "weapons [or] narcotics." *Stanford v. Texas*, 379 U.S. 476, (1965); *see also Andresen v. Maryland*, 427 U.S. 463, 482, n. 11 (1976) (law enforcement receives less latitude for seizing "innocuous" objects, more latitude for contraband).

3. Vehicles

Our initial motion made one specific broadness challenge: "[f]or example, **[the warrant]** allows for a search of all vehicles on the property and not just the **[specific vehicle the suspects]** were believed to be using." LaFave et al. write that "[w]hen a warrant is issued for search of certain premises and "all automobiles thereon," it is likely to be vulnerable to attack because of insufficiency of description and lack of probable cause extending also to such vehicles."[10]

warrant authorizing a search and seizure of everything in the drug store with the possible exception of aspirin and tooth-paste").

[6] *See Stanford v. Texas*, 379 U.S. 476 (1965).

[7] *See Zurcher v. Stanford Daily*, 436 U.S. 547 (1978).

[8] *See People v. Coke*, 2020 CO 28, 461 P.3d 508 (2020) (given "cell phones' immense storage capacities," search warrant that "permitted the officers to search all texts, videos, pictures, content lists, phone records, and any dates that showed ownership or possession… violates the particularity demanded by the Fourth Amendment"); *Burns v. United States*, 235 A.3d 758, 775 (D.C. Ct. App. 2020) ("given the heightened privacy interests attendant to modern smart phones under *Riley*, it is thus constitutionally intolerable for search warrants simply to list generic categories of data typically found on such devices as items subject to seizure.") (referring to *Riley v. California*, 573 U.S. 373, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014); *Commonwealth v. Wilkerson*, 486 Mass. 159, 156 N.E.3d 754 (2020); *Commonwealth v. Dorelas*, 473 Mass. 496, 43 N.E.3d 306 (2016) ("in the virtual world, it is not enough to simply permit a search to extend anywhere the targeted electronic objects possibly could be found, as data possibly could be found anywhere within an electronic device. Thus, what might have been an appropriate limitation in the physical world becomes a limitation without consequence in the virtual one.").

[9] *See United States v. Galpin*, 720 F.3d 436, 446 (2d Cir. 2013) ("Where, as here, the property to be searched is a computer hard drive, the particularity requirement assumes even greater importance. As numerous courts and commentators have observed, advances in technology and the centrality of computers in the lives of average people have rendered the computer hard drive akin to a residence in terms of the scope and quantity of private information it may contain.").

[10] 2 Wayne R. LaFave, Jerold H. Israel, Nancy J. King & Orin S. Kerr, *Criminal Procedure* § 3.4(e) Particular description of place to be searched (4th ed. 2021). LaFave et al. cite the following: *Green v. State*, 161 Tex.Crim. 131, 275 S.W.2d 110 (1955); *State v. Jamison*, 482 N.W.2d 409 (Iowa 1992); *Garrett v. State*, 270 P.2d 1101 (Okla.Crim.App.1954).

C. The Nexus Requirement

The nexus requirement is a derivation of the requirement that probable cause must exist to seize the item or search the location. *See United States v. Griffin*, 555 F.2d 1323, 1325 (5th Cir. 1977); *accord State v. Cardinale*, 251 La. 827, 834, 206 So. 2d 510, 512 (1968), *writ dismissed*, 394 U.S. 437, 89 S.Ct. 1161, 22 L.Ed.2d 398 (1969) ("Article I, Section 7 of the Louisiana Constitution… provides that no search or seizure shall be made except upon warrant issued upon 'probable cause' (such probable cause usually being a showing of a nexus between the object sought and the commission of a known or suspected crime)."). "Probable cause exists when there are "reasonably trustworthy facts" which, given the totality of the circumstances, are sufficient to lead a prudent person to believe that the items sought constitute fruits, instrumentalities, or evidence of a crime." *Kohler v. Englade*, 470 F.3d 1104 (5th Cir. 2006).

In a more operationalized sense, it must be probable that: (1) the described items are connected with criminal activity (*see Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 307 (1967) ("There must, of course, be a nexus... between the item to be seized and criminal behavior"); and (2) the described items are to be found in the place searched (*see State v. Mena*, 399 So. 2d 149, 152 (La. 1981) ("All that is required is that the affidavit, interpreted in a commonsense and realistic manner, contain information which would warrant a person of reasonable caution to believe that the articles sought are located at the place to be searched") (citing *State v. Baker* 389 So. 2d 1289 (La. 1980) and *State v. Guidry*, 388 So. 2d 797 (La.1980)); *see also State v. Byrd*, 568 So. 2d 554, 559 (La. 1990).

The Louisiana Supreme Court has interpreted this first requirement—that the described items be connected with criminal activity—to mean that the object "probably will lead to an arrest or conviction of a person for a particular crime." *State v. Nuccio*, 454 So. 2d 93, 99 (La.